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April 11. 1882.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 274.

MOSES WARREN, PLAINTIFF IN ERROR,

vs.

JOSEPH M. STODDART.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED SEPTEMBER 29, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 274.

MOSES WARREN, PLAINTIFF IN ERROR,

vs.

JOSEPH M. STODDART.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the judges thereof, on Saturday, the twenty-second day of February, in the year of our Lord one thousand eight hundred and seventy-nine, and of our Independence the one hundred and third.

WILLIAM H. BRADLEY, *Clerk.*

JOSEPH M. STODDART
v.
MOSES WARREN. } 15671, 1155. Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *sct:*

Be it remembered that on the 17th day of June, A. D. 1878, came the said plaintiff, Joseph M. Stoddart, by Messrs. Tenneys, Flower and Abercrombie, his attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, his bond for costs and præcipe for a writ of summons against said defendant in said-entitled cause; which said bond for costs and præcipe are respectively in the words and figures following, to wit:

2 *Bond for costs.*

Circuit court of the United States, northern district of Illinois.

JOSEPH M. STODDART
vs.
MOSES WARREN. } Security for costs.

I enter myself security for costs in the above-entitled cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, I hereby agree and stipulate that execution may issue against my property for any such costs.

Dated this seventeenth day of June, 1878.

D. K. TENNEY.

(Endorsed:) Filed June 17, A. D. 1878. Wm. H. Bradley, clerk.

Præcipe.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States for the seventh circuit and northern district of Illinois, July term, A. D. 1878.

JOSEPH M. STODDART, PLAINTIFF,
v.
3 MOSES WARREN, DEFENDANT. } Assumpsit.

The clerk of said court will issue a summons in the above cause, directed to the marshal of the northern district of Illinois, in plea of

trespass on the case on promises, returnable at the July term of said court, A. D. 1878, to the damage of the plaintiff of two thousand dollars.

TENNEYS, FLOWER AND ABERCROMBIE,
Pl'ff's Att'ys.

To W. H. BRADLEY, Esq., clerk.
JUNE 17th, 1878.

(Endorsed:) Filed this 17th day of June, A. D. 1878. Wm. H. Bradley, clerk.

And on the same day, to wit, the 17th day of June, A. D. 1878, a writ of summons issued out of said clerk's office against said defendant in said-entitled cause; which said writ, with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Writ of summons.

Circuit court of the United States of America, northern district of Illinois, ss.

The United States of America to the marshal of the northern district of Illinois, greeting:

4 We command you to summon Moses Warren, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of July next, to answer unto Joseph M. Stoddart of a plea of trespass on the case upon promises, to his damage, as he alleges, of two thousand dollars; and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 17th day of June, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the 102d year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

I have served the within writ by reading the same to and within the presence and hearing of Moses Warren therein named, on the 18 day of June, 1878.

J. S. HILDRUP,
U. S. Marshal,
By D. D. SABIN, *Deputy.*

(Endorsed:) Filed June 21, 1878. Wm. H. Bradley, clerk.

5 And afterwards, to wit, on the 21st day of June, A. D. 1878, said plaintiff, by his attorneys, filed in said clerk's office his declaration in said-entitled cause; which said declaration is in the words and figures following, to wit:

Declaration.

In the circuit court of the United States, northern district of Illinois' July term, A. D. 1878.

Joseph M. Stoddart, who is a citizen of the State of Pennsylvania

and doing business at Philadelphia, in said State, under the name of J. M. Stoddart and Co., plaintiff in this suit, by Tenneys, Flower and Abercrombie, his attorneys, complains of Moses Warren, who is a citizen of the State of Illinois, and a resident of said northern district, defendant in this suit, summoned, etc., of a plea of trespass on the case on promises :

For that whereas the said defendant heretofore, to wit, on the eighth day of April, in the year of our Lord one thousand eight hundred and seventy-eight, at Chicago, to wit, at Chicago in the district aforesaid, made his certain note in writing commonly called a promissory note, bearing date the day and year last aforesaid, and then and there delivered the said note to the said plaintiff, in and by which said note the said defendant, by the name, style, and description of Moses Warren, promised to pay to the order of said plaintiff, by the name, style, and description of J. M. Stoddart and Co., two months after the date thereof, the sum of five hundred and ninety and $\frac{14}{100}$ dollars, at his office, 103 State street for value received. By reason whereof, and by force of the statute in such case made and provided, the said defendant became liable to pay to the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of the said note; and being so liable, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of said note.

6

And also for that whereas the said defendant afterwards, to wit, on the seventh day of March, in the year of our Lord one thousand eight hundred and seventy-eight, at Chicago, to wit, at Chicago in the district aforesaid, made his other certain note in writing commonly called a promissory note, bearing date the day and year last aforesaid, and then and there delivered the said note to the said plaintiff, in and by which said note the said defendant, by the name, style, and description of Moses Warren, promised to pay to the order of the said plaintiff, by the name, style, and description of J. M. Stoddart and Co., three months after the date thereof, the sum of four hundred fifty-nine and $\frac{30}{100}$ dollars, payable at his office, 103 State street, for value received. By reason whereof, and by force of the statute in such case made and provided, the said defendant became liable to pay to the said plaintiff the said sum of money specified in the said note last mentioned, according to the tenor and effect of the said note; and being so liable, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place last aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of said note last mentioned.

7

And whereas also the said defendant afterwards, to wit, on the tenth day of June, in the year of our Lord one thousand eight hundred and seventy-eight, in said county, became and was indebted to the said plaintiff in the further sum of, to wit, fifteen hundred dollars of lawful money of the United States of America, for money before that time lent and advanced by the said plaintiff to the said defendant, and at the special instance and request of the said defendant, and in the like sum for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant, and at the like special instance and request of the said defendant, and in the like

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sum for other money by the said defendant before that time had and received to and for the use of the said plaintiff, and in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiff, and in the like sum for goods, wares, and merchandise before that time sold and delivered by the said plaintiff to the said defendant, at the like special instance and request of the said defendant, and in the like sum for the price and value of work then done and material for the same provided by the said plaintiff for the said defendant, and at the like special request of the said defendant and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on day and year aforesaid, and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned when the said defendant should be thereunto afterwards requested.

And whereas also the said defendant afterwards, to wit, on
9 the day and year last aforesaid, and at the place last aforesaid, accounted, together with the said plaintiff, of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff, and then and there being in arrears and unpaid, and upon such accounting the said defendant then and there was found to be in arrears and indebted to the said plaintiff in the further sum of, to wit, fifteen hundred dollars of like lawful money as aforesaid; and being so found in arrears and indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant, although often requested, etc., to wit, on the day when the said notes became due and payable according to the tenor and effect thereof, and oftentimes since, to wit, at the place last aforesaid, has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto wholly neglected and refused, and still does neglect and refuse, to the damage of the said
10 plaintiff of two thousand dollars; and therefore the said plaintiff brings suit, etc.

TENNEYS, FLOWER AND ABERCROMBIE.
Plaintiff's Attorneys.

Copy of instrument and account sued on.

(Copy.)

CHICAGO, *April* 8th, 1878.

Two months after date I promise to pay to the order of J. M. Stoddart and Co. five hundred ninety and $\frac{14}{100}$ dollars, payable at my office, 103 State st., value received. $590.14. Due June 8–11.

MOSES WARREN.

Plaintiff's affidavit of amount due.

Circuit court of the United States, northern district of Illinois, July term, A. D. 1878.

JOSEPH M. STODDART
v.
MOSES WARREN.

STATE OF ILLINOIS,
County of Cook, ss:

Daniel K. Tenney, one of plaintiff's attorneys, being duly sworn, says that the demand of the plaintiff in the above-entitled cause is for money due on the two promissory notes declared upon in the declaration herein, copies of which are attached to said declaration, the originals being in the possession of this deponent, both of which are unpaid, and that there is due to the plaintiff from the defendant,
11 after allowing to him all just credits, deductions, and set-offs, in the sum of ten hundred and forty-nine and $\frac{44}{100}$ dollars; and that said defendant is a resident of said Cook County, in the northern district of Illinois.

DANIEL K. TENNEY.

Subscribed and sworn to before me this 21st day of June, 1878.
[SEAL.] JESSE HOLDOM,
Notary Public.

(Endorsed:) Filed this twenty-first day of June, 1878. Wm. H. Bradley, clerk.

NOTE.—This cause was afterwards, on February 17, 1879, by order of court entered of record on that day, consolidated with causes Gen. Nos. 15732 and 15862; said order of court being set out on page 52 of this transcript.

12 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the judges thereof, on Saturday, the twenty-second day of February, in the year of our Lord one thousand eight hundred and seventy-nine, and of our Independence the one hundred and third.

WILLIAM H. BRADLEY, *Clerk.*

JOSEPH M. STODDART
v.
MOSES WARREN. } 15732, 1188. Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *sct:*

Be it remembered that on the nineteenth day of July, A. D. 1878, came the said plaintiff, Joseph M. Stoddart, by Messrs. Tenneys, Flower and Abercrombie, his attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, his bond for costs and præcipe for a writ of summons against said defendant in said-entitled cause; which said bond for costs and præcipe are respectively
13 in the words and figures following, to wit:

Bond for costs.

Circuit court of the United States, northern district of Illinois.

JOSEPH M. STODDART, JR., *vs.* MOSES WARREN. } Security for costs.

I enter myself security for costs in the above-entitled cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, I hereby agree and stipulate that execution may issue against my property for any such costs.

Dated this nineteenth day of July, 1878.

O. P. ABERCROMBIE.

(Endorsed:) Filed July 19, A. D. 1878. Wm. H. Bradley, clerk.

Præcipe.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States for the seventh circuit and northern district of Illinois, October term, A. D. 1878.

JOSEPH M. STODDART, JR., PLAINTIFF, *v.* MOSES WARREN, DEFENDANT. } Assumpsit.

14 The clerk of said court will issue a summons in the above cause, directed to the marshal of the northern district of Illinois, in plea of trespass on the case on promises, returnable at the October term of said court, A. D. 1878, to the damage of the plaintiff of one thousand dollars.

TENNEYS, FLOWER AND ABERCROMBIE,
Pl'ff's Att'ys.

To W. H. BRADLEY, Esq., *Clerk.*

JULY 19TH, 1878.

(Endorsed:) Filed this 19th day of July, A. D. 1878. Wm. H. Bradley, clerk.

And on the same day, to wit, the 19th day of July, A. D. 1878, a writ of summons issued out of said clerk's office against said defendant in said-entitled cause; which said writ, with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Writ of summons.

Circuit court of the United States of America, northern district of Illinois, ss.

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to summon Moses Warren, if found in your district,

to be and appear before our judges of our circuit court of the
15 United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto Joseph M. Stoddart, jr., of a plea of trespass on the case upon promises, to his damage, as he alleges, of one thousand dollars; and have you then and there this writ:

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 19th day of July, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the 103d year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

I have served the within writ by reading the same to and within the presence and hearing of Moses Warren therein named, on the 23d day of July, A. D. 1878.

J. S. HILDRUP,
U. S. Marshal,
By D. D. SABIN, *Deputy.*

(Endorsed:) Filed Aug. 2, A. D. 1878. Wm. H Bradley, clerk.

16 And afterwards, to wit, on the 20th day of July, A. D. 1878, said plaintiff, by his attorneys, filed in said clerk's office his declaration against said defendant, and at the same time filed an affidavit of the amount due in said-entitled cause; which said declaration and affidavit are respectively in the words and figures following, to wit:

Declaration.

In the circuit court of the United States for the northern district of Illinois, October term, A. D. 1878.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

James M. Stoddart, jr., who before and at the several times hereinafter mentioned was doing business under the firm-name of J. M. Stoddart and Co., and who is a citizen of the State of Pennsylvania, plaintiff in this suit, by Tenneys, Flower and Abercrombie, his attorneys, complains of Moses Warren, who is a citizen of the State of Illinois and a resident of said district, defendant in this suit, summoned, etc., of a plea of trespass on the case on promises:

For that whereas the said defendant heretofore, to wit, on the eighth day of April, in the year of our Lord one thousand eight hundred and seventy-eight, at Chicago, to wit, at the district aforesaid, made his certain note in writing commonly called a promissory note, bearing date the day and year last aforesaid, and then and there delivered the said note to the said plaintiff, in and by which said note the said
17 defendant, by the name, style, and description of Moses Warren, promised to pay to the order of said plaintiff, by the name, style, and description of J. M. Stoddart and Co., five hundred ninety-four and $\frac{92}{100}$ dollars, three months after the date thereof, for value received. By reason whereof, and by force of the statute in such case made and provided, the said defendant became liable to pay to the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of the said note; and being so liable, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year

last aforesaid, and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of said note.

And whereas also the said defendant afterwards, to wit, on the nineteenth day of July, in the year of our Lord one thousand eight hundred and seventy-eight, in said county, became and was indebted to the said plaintiff in the further sum of, to wit, one thousand dollars of lawful money of the United States of America, for money before that time lent and advanced by the said plaintiff to the said defendant, and at the special instance and request of the said defendant, and in the like sum for other
18 money by the said plaintiff before that time paid, laid out, and expended for the said defendant, and at the like special instance and request of the said defendant, and in the like sum for other money by the said defendant before that time had and received to and for the use of the said plaintiff, and in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiff, and in the like sum for goods, wares, and merchandise before that time sold and delivered by the said plaintiff to the said defendant, at the like special instance and request of the said defendant, and in the like sum for the price and value of work then done and material for the same provided by the said plaintiff for the said defendant, and at the like special request of the said defendant; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on day and year aforesaid, and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned when the said defendant should be thereunto afterwards requested.

And whereas also the said defendant afterwards, to wit, on
19 the day and year last aforesaid, and at the place last aforesaid, accounted, together with the said plaintiff, of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiff in the further sum of, to wit, one thousand dollars of like lawful money as aforesaid; and being so found in arrear and indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant, although often requested, etc., to wit, on the day when the said note became due and payable according to the tenor and effect thereof, and oftentimes since, to wit, at the place last aforesaid, has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto wholly neglected and refused, and still does neglect and refuse, to the damage of the said plaintiff
20 of one thousand dollars; and therefore the said plaintiff brings suit, etc.

TENNEYS, FLOWER AND ABERCROMBIE,
Plaintiff's Attorneys.

Copy of instrument and account sued on.

$594.02.] CHICAGO, *April 8th*, 1878.

Three months after date I promise to pay to the order of J. M. Stoddart and Co. five hundred ninety-four and $\frac{02}{100}$ dollars, payable, at my office, 103 State st., value received.

MOSES WARREN.

(Endorsed:) Filed this 20th day of July, 1878. Wm. H. Bradley, clerk.

Affidavit of amount due.

Circuit court of the United States for the northern district of Illinois, October term, A. D. 1878.

JOSEPH M. STODDART, JR., }
vs. }
MOSES WARREN. }

COOK COUNTY, *ss:*

Otis P. Abercrombie, one of the plaintiff's attorneys, being duly sworn, says that the demand of the plaintiff in the above-entitled cause is for money due and unpaid upon a certain promissory note declared upon in the declaration herein, a copy of which is attached to said declaration and made a part of this affidavit, the original note
21 being in possession of deponent, past due, and wholly unpaid; and that there is due to the plaintiff from the defendant, after allowing to him all just credits, deductions, and set-offs on the indebtedness aforesaid, the sum of five hundred and ninety-four and $\frac{02}{100}$ dollars, and interest thereon at the rate of six per cent. per annum from the eleventh day of July, A. D. 1878. Deponent further says that the said defendant is a resident of said Cook County, in the district aforesaid.

O. P. ABERCROMBIE.

Subscribed and sworn to before me this twentieth day of July, A. D. 1878.

[SEAL.] JESSE HOLDOM,
Notary Public.

(Endorsed:) Filed July 20, 1878. Wm. H. Bradley, cl'k.

NOTE.—This cause was afterwards, on February 17, 1879, by order of court entered of record on that day, consolidated with causes Gen. Nos. 15671 and 15862, said order of court being set out on page 52 of this transcript.

22 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the judges thereof, on Saturday the twenty-second day of February, in the year of our Lord one thousand eight hundred and seventy-nine, and of our Independence the one hundred and third.

WILLIAM H. BRADLEY, *Clerk.*

JOSEPH M. STODDART } 15862, 1255. Assumpsit.
v.
MOSES WARREN. }

NORTHERN DISTRICT OF ILLINOIS, *set:*

Be it remembered that on the 18th day of September, A. D. 1878, came the said plaintiff, Joseph M. Stoddart, by Messrs. Tenneys, Flower and Abercrombie, his attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, his bond for costs and præcipe for a writ of summons against said defendant in said-entitled cause; which said bond and præcipe are respectively in the words and figures following, to wit:

23 *Bond for costs.*

Circuit court of the United States, northern district of Illinois.

JOSEPH M. STODDART } Security for costs.
v.
MOSES WARREN. }

I enter myself security for costs in the above-entitled cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by me, I hereby agree and stipulate that execution may issue against my property for any such costs.

Dated this eighteenth day of September, 1878.

JAMES M. FLOWER.

(Endorsed:) Filed Sept. 18th, A. D. 1878. Wm. H. Bradley, clerk.

Præcipe.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States for the seventh circuit and northern district of Illinois, October term, A. D. 1878.

JOSEPH M. STODDART, DOING BUSINESS AS J. M. Stoddard and Co., plaintiff, } $6,000.
vs.
24 MOSES WARREN, DEFENDANT. }

The clerk of said court will issue a summons in the above cause, directed to the marshal of the northern district of Illinois, in plea of assumpsit, returnable at the October term of said court, A. D. 1878, to the damage of the plaintiff of six thousand dollars.

TENNEYS, FLOWER AND ABERCROMBIE,
Pl'ff's Att'ys.

SEPTEMBER 18, 1878.
To W. H. BRADLEY, Esq., *Clerk.*

(Endorsed:) Filed this 18th day of September, A. D. 1878. Wm. H. Bradley, clerk.

And on the same day, to wit, the 18th day of September, A. D. 1878, a writ of summons issued out of said clerk's office in said-entitled cause; which said writ, with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Writ of summons.

Circuit court of the United States of America, northern district of Illinois, ss.

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to summon Moses Warren, if found in your
25 district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto Joseph M. Stoddart, doing business as J. M. Stoddart and Co., of a plea of trespass on the case upon promises, to his damage, as he alleges, of six thousand dollars; and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 18th day of September, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the 103d year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

I have served the within writ by reading the same to and within the presence and hearing of Moses Warren therein named, on the 18 day of September, 1878.

J. S. HILDRUP,
U. S. Marshal,
By J. STILLWELL, *Deputy.*

(Endorsed:) Filed September 30, A. D. 1878. Wm. H. Bradley, clerk.

26 Afterwards, to wit, on the 23d day of September, A. D. 1878, said plaintiff, by his attorneys, filed in said clerk's office his declaration against said defendant, and at the same time filed an affidavit of the amount due in said-entitled cause; which said declaration and affidavit are respectively in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA,
Northern District of Illinois,
State of Illinois, Cook county, ss:

In the circuit court of the United States for the northern district of Illinois, of the October term, A. D. 1878.

Joseph M. Stoddart, who is doing business under the name of J. M. Stoddart and Co., and who is a citizen and a resident of the State of Pennsylvania, plaintiff in this suit, by Tenneys, Flower and Abercrombie, his attorneys, complains of Moses Warren, who is a citizen and a resident of the State of Illinois, defendant, who has been summoned, etc., in a plea of trespass on the case on promises:

For that whereas the said defendant heretofore, to wit, on the twentieth day of April, in the year of our Lord one thousand eight hundred and seventy-eight, at Chicago, to wit, at the district aforesaid, made his certain promissory note, and then and there delivered the same to said
27 plaintiff, Joseph M. Stoddart, in and by which said note said defendant, by the name, style, and description of Moses Warren, promised to pay to the order of the said plaintiff, by the name, style, and description of J. M. Stoddart and Co., the sum of four hundred and thirty-six and $\frac{50}{100}$ dollars, three months after the date thereof, payable at 103 State st., in said Chicago, with 8% interest, for value received. By means whereof, and by force of the statute in such case made and provided, the said defendant became liable to pay said plaintiff said sum of money mentioned in said note; and being so liable, in consideration thereof, then and there undertook and promised to pay the same to the said plaintiff, according to the tenor and effect, true intent, and meaning of the said note, to wit, at the place aforesaid.

And whereas also the said defendant afterward, to wit, on the first day of September, in the year of our Lord one thousand eight hundred and seventy-eight, to wit, at the district aforesaid, became and is indebted unto the plaintiff in a large sum of money, to wit, six thousand dollars, for money before that time lent and advanced to and paid, laid out, and expended for said defendant by said plaintiff, at said defendant's request, and for money before that time had and received by said defendant to and for the use of said plaintiff, and also in like sum for goods, wares, and merchandise before that time sold and
28 delivered by said plaintiff to said defendant, at like special instance and request, and also in like sum for the labor, care, and diligence of said plaintiff before that time done and performed by said plaintiff for said defendant, and at the like instance and request of said defendant, and also in like sum then and there found due and owing said plaintiff on an account stated between them; and being so indebted, said defendant, in consideration thereof, then and there undertook and promised to pay said plaintiff said several sums of money above mentioned when thereunto afterwards requested.

Yet the said defendant, not regarding his said promises and undertakings, but contriving, etc., although often requested so to do, has not paid said plaintiff either of said sums of money above mentioned, or any part thereof, but so to do has hitherto wholly neglected and refused, and still does neglect and refuse, to the damage of said plaintiff of six thousand dollars; and therefore he brings this suit, etc.

TENNEYS, FLOWER AND ABERCROMBIE,
Att'ys for Pl'ff.

Copy of instrument and account sued upon.

$436.50.] CHICAGO, *Apr.* 20, 1878.

Three months after date I promise to pay to the order of J. M. Stoddart and Co. four hundred and thirty-six dollars and fifty cents, payable at my office, 103 State st., with 8% interest, value received.

MOSES WARREN.

29 Moses Warren, bought of J. M. Stoddart and Co., publishers, No. 723 Chestnut street:

1877.		Vols.				
Feb'y 24.		3	Uncut Encycl'a Britannica,	1: 1, 2, 3, @ 5.00, l. ½—2.50..	7 50	
		2	Library " "	1: 1, 2, " 6.00, l. 45 %—3.30.....	6 60	
		1	Cloth prospectus "	1 50 & 2 full mor. pros. @ 3.50—7.00.....	8 50	
		20	Specimen pages & 50 circulars free.....			22 60
March 10.		10	Library Encycl. Brit.,	5, 1; 5, 5, @ 6 00, l. 45 %—3.30..	33 00	
				Box.....	30	33 30
	13.	20	Uncut " "	5, 1 to 4, @ 5.00, l. ½—2.50..	50 00	
		20	Library " "	5, 1 to 4, " 6.00. l. 45 %—3.30.	66 00	
				Box, .60; carting, .50.....	1 10	117 10
	15.	27	Uncut " "	3, 3; 5, 4; 19, 5; 5.00, l. ½—2.50.	67 50	
		24	Cloth " "	1, 2; 2, 3; 1, 4; 20, 5; 5.00, l. ½—2.50.....	60 00	
		31	Library " "	5, 2; 2, 3; 4, 4; 20, 5; 6.00, l. 45 %—3.30.....	102 30	
		24	Parts " "	4: 11, 12; 3: 13, 14; 1, 15; 3, 31 to 3, 34, @ 25.....	6 00	
		300	Spec. pages " "	.....	9 00	
				2 cases & carting.....	1 85	246 65
	21.	20	Uncut " "	20, 5, @ 5.00, l. ½—2.50.....	50 00	
		20	Library " "	20, 5; " 6.00, l. 45 %—3.30.....	66 00	
				Box, .40 & carting, .50.....	90	116 90
	26.	30	" " "	10, 1; 2, 5; 6.00, l. 45 %—3.30..	99 00	
				Box, 50 & carting .50.....	1 00	100 00
April 3.		30	" " "	30, 1; 6.00, l. 45 %—3.30.....	99 00	
				Box, .55 & carting, .50.....	1 05	
				1,025 circulars free.....		100 05
April 5.		1	½ mor. Encycl. Brit.,	1: 1, @ 7.00, l. 40 %—4.20.....	4 20	
		1	½ C'lf. " "	1: 1, " 8.00, " —4.80.....	4 80	
		1	Full mor. " "	1: 1, " 10.00, " —6.00.....	6 00	15 00
	16.	60	Parts, 3, 31 to 50 "	@ 25.....	15 00	
		5	Cloth Encycl'a "	" 5.00, l. ½—2.50.....	12 50	
		25	Library " "	5, 2; 10, 3; 5, 4; 5, 5; 6.00, l. 45 %, 3.30.....	82 50	
				Box, .55 & carting, .50.....	1 05	111 05
May 1.		18	Uncut " "	5, 12; 4, 45; 5.00, l. ½—2.50.....	45 00	
		3	Cloth " "	1, 3; 2, 5; 5.00, " —2.50.....	7 50	
		33	Library " "	10, 1; 6: 2, 3, 4; 5, 5; 6.00, ½, 45 %, 3.30.....	108 90	
		38	½ mor. " "	5: 1, 2; 3; 3; 5, 4; 20, 5; 7.00, " " 3.85.....	146 30	
				2 cases, 60c.=1.20 & carting, .50..	1 79	309 40
	9.	20	Cloth " "	5: 1, 2, 3, 4; 5.00, l. ½—2.50.....	50 00	
		10	Library " "	5: 1, 2; 6.00, l. 45 %—3.30.....	33 00	
		20	½ mor. " "	5: 1, 2, 3, 4; 7.00, " —3.85.....	77 00	
30				Box, .65 & carting, .50.....	1 15	161 15
	15.	5	Sets backs " "	.75.....		3 75
	16.	54	Parts 3: 9, 10; 3, 15 to 30,	@ 50, l. ½—25.....	13 50	
		20	Uncut Encyclo. Brit.,	5, 1: 2, 3, 5; 5.00, l. ½—2.50.....	50 00	
		25	Library " "	5, 1; 10, 2; 5, 3; 4; 6.00, " 45 %—3.30.....	82 50	
		5	½ mor. " "	5, 4; 7.00, l. 45 % —3.85.....	19 25	
				Box, .70 & carting, .50.....	1 20	166 45

May	19.	15	Library Encyclo. Brit., 3, 1 to 5, @ 6.00, l. 45 % —3.30..	49 50		
		5	½ c'lf " " 1: 1, to 5 " 8.00 " 45 % —4.40..	22 00		
		7	Sets backs " .75	5 25		
			Box, .60 & carting, .50.....	1 10		
					77	85
	26.	50	Library " " 20, 1; 10: 2, 3, 4, @ 6.00, l. 45 % —3.30	165 00		
		10	Cloth " " 10, 1; 5.00, l. ½—2,50.....	25 00		
			Box, .65 & carting, .50.....	1 15		
					191	15
June	4.	5	Uncut " " 5, 1; 5.00 l. ½—2.50.....	12 50		
		25	Cloth " " 5, 1 to 5; 5.00, l. ½—2.50.....	62 50		
		86	Library " " 40, 1; 15, 2; 11, 3; 10: 4, 5, 6.00, l. 45 % —3.30.....	283 80		
		35	½ mor. " " 10: 1, 2, 3; 5, 4; 7.00, l. 45 %—3.85.....	134 75		
		100	Specimen pages " .03.....	3 00		
					496	55
			2 boxes, 8=1.60 & carting, .50.....		2	10
	6.	4	Library " " 4, 3; 6.00, l. 45 % —3.30.....		13	20
	16.	25	Uncut " " 5, 1 to 5; 5.00, l. ½—2.50.....	62 50		
		5	Cloth " " 5, 5; 5.00, l. ½—2.50.....	12 50		
		65	Library " " 20, 12; 10, 3; 5, 4; 10, 5; 6.00, l. 45 %—3.30.....	214 50		
		15	½ mor. " " 5, 1; 5: 4, 5; 7.00 l. 45 % —3.85.	57 75		
			2 boxes, .60=1.20 & carting, .50..	1 70		
					348	95
	20.	25	Cloth " " 5, 1 to 5; 5.00, l. ½—2.50.....	62 50		
		35	Library " " 5, 3; 10, 4; 20, 5; 6.00, l. 45 %—3.30.....	115 50		
		200	Specimen pages " .03.....	6 00		
			Box, .75 & carting, .50.....	1 25		
					185	25
July	2.	80	Library " " 20: 1, 2, 3, 4; 6.00, l. 45 % —3.30.	264 00		
			Box, .80 & carting, .50.....	1 30		
					265	30
	2.	1	Walnut book-shelf.....		5	00
	3.	10	Uncut Encyclo. Brit., 5, 1, 2; 5.00, l. ½—2.50.....	25 00		
		10	Cloth " " 10, 1; 5.00, l. ½—2.50.....	25 00		
		115	Library " " 25: 1, 2, 3, 4: 15, 5; 6.00, l. 45 %, 3.30.....	379 50		
			2 boxes, 1.50 & carting, .50.....	2 00		
					431	50
	16.	20	Cloth " " 10: 1, 2; 5.00, l. ½—250.....	50 00		
		20	½ mor. " " 5, 1; 10, 2; 5, 5; 7.00, l. 45 %—3.85.	77 00		
31			Box, .55 & carting, .50.....	1 05		
					128	05
	19.		To interest on note dated July 12th, $500		7	33
Aug.	1.	17	Uncut Encyclo. Brit., 3, 1; 2, 3, 5, 4; 2, 5; 5.00, l. ½—2.50.	42 50		
		80	Library " " 40, 1; 30, 2; 10, 5; 6.00, l. 45 %—3.30	264 00		
		15	½ mor. " " 5: 2, 3, 4; 7.00, l. 45 % —3.85.....	57 75		
		5	½ c'lf " " 1: 1, 2, 3, 4, 5; 8.00, l. 45 % —4.40	22 00		
			2 cases, 1.35 & carting—50	1 85		
					388	10
	9.	5	Cloth " " 5, 3; 5.00, l. ½—2.50.....	12 50		
		50	Library " " 20, 1; 2, 10, 3; 6.00, l. 45 % —3.30.	165 00		
		5	½ mor. " " 5, 1; 7.00, l. 45 % —3.85.....	19 25		
		7	½ C'lf " " 1: 1, 2, 2; 3, 1, 4: 5; 8.00, l. 45 %—4.40	30.80		
			Box, .75 & carting, .50.....	1 25		
					228	80
	15.	120	Library " " 30, 1, 2; 20: 3, 4, 5; 6.00, l. 45 %—3.30.	396 00		
		15	Cloth " " 3: 1, 2, 3, 4, 5; 5.00, l. ½—2.50.....	37 50		
			2 boxes, .75=1.50 & carting, .50..	2 00		
					435	50
	23.		To interest on note dated Aug. 20, $400		6	20
Sept.	1.	35	Uncut Encyclo. Brit., 10, 1; 5, 2; 10, 3; 5: 4, 5; 5.00, l. ½—2.50.....	87 50		

		75 Cloth " " 15, 1; 15, 2; 15, 3, 4, 5; 5.00, l. ½ 2.50	187 50		
		130 Library " " 35: 1, 2; 20, 3, 4, 5; 6.00, l. 45 %—3.30	429 00		
		5 ½ mor. " " 5, 3; 7.00, l. "—3.85	19 25		
		4 boxes, 2.80 & carting, .50	3 30		
					726 55
	11.	30 Library 30, 1; 6.00, l. 45 % —3.30	99 00		
		20 ½ mor. 5: 1, 2; 3, 3; 5, 4; 3, 5; 7.00, l. 45 % —3.85	77 00		
		Box, .75 & carting, .50	1 25		
					177 25
	22.	25 Uncut, 25, 6; 5.00, l. ½—2.50	62 50		
		63 Cloth, 3, 1; 10, 2; 50, 6; 5.00, l. ½—2.50	157 50		
		128 Library, 40, 1; 10: 3, 4, 5; 58, 6; 6.00, l. 45 % —3.30	422 40		
		10 ½ mor. 5: 1, 2; 7.00, l. " —3.85	38 50		
		3 boxes, 2.30 & carting, .50	2 80		
					683 70
	25.	7 Cloth, 7, 1; 5.00, l. ½—2.50	17 50		
		19 Library, 19, 6; 6.00, l. 45 % —3.30	62 70		
		30 ½ mor. 30, 6; 7.00, l. " —3.85	115 50		
		Box, .65 & carting, .50	1 15		
					196 85
	26.	50 Cloth, 20, 1; 10, 2, 3, 4; 5.00, l. ½—2.50	125 00		
		14 Library, 14, 6; 6.00, l. 45 % —3.30	46 20		
		Box, .75 & carting, .50	1 25		
					172 45
Oct.	2.	40 Cloth, 5, 1; 10: 2, 3; 10, 5; 5, 6; 5.00, l. ½—2.50	100 00		
32		200 Library, 50: 1, 2, 5, 6; 6.00, l. 45 %—3.30	660 00		
		30 ½ mor., 10: 1, 4, 5; 7.00, l. " —3.85	115 50		
		4 cases, 2.85; & carting, .50	3 35		
					878 85
	4.	5 Cloth, 5, 1; 5.00, l. ½—2.50	12 50		
		93 Library, 40, 3; 53, 6; 6.00, l. 45 %—3.30	306 90		
		2 boxes, 1.25 & carting, .50	1 75		
					321 15
	8.	15 Cloth, 10, 4; 5, 6; 5.00, l. ½—2.50	37 50		
		57 Library, 40, 3; 17, 4; 6.00, l. 45 %—3.30	188 10		
		Box, .80 & carting, .50	1 30		
					226 90
	13.	88 " 20, 1; 12, 4; 56, 6; @ 6.00, l. 45 %—3.30	290 40		
		2 boxes, 1.20 & carting, .50	1 70		
					292 10
	17.	18 " 18, 1; @ 6.00, l. 45 %—3.30	59 40		
		30 ½ mor. 30, 6; 7.00, l. " —3.85	115 50		
					174 90
	19.	33 Library, 12, 1; 21, 4; 6.00, l. " —3.30	108 90		
		Box, .60 & carting, .50	1 10		
					110 00
Oct.	30.	15 Encycl's Brit. orders, @ 5.00, as agreed with Mr. Warren			75 00
		Edward Teggart, Grand Rapids, Mich., to order 5.00; G. K. Hodges & Co., Elkhorn, Wis., 2 @ 5.00—10.00; H. Dickerson, Grinnell, Iowa, 3 @ 5.00—15.00; Brown & Pitcher, Jackson, Mich., 9 @ 5.00—45.00.			
Nov.	1.	15 Cloth, 10, 1; 5, 2; @ 5.00, l. ½—2.50	37 50		
		113 Library, 50, 1; 60, 2; 3, 4; " 6.00, l. 45 %—3.30	372 90		
		90 ½ mor., 20, 1; 2; 15, 3; 20, 4; 15, 5; 7.00, l. " —3.85	346 50		
		13 ½ c'll, 2, 1; 1: 2, 3; 2: 4, 5; 5, 6; 8.00 " —4.40	57 20		
		3 boxes, 2.35 & carting—50	2 85		
					816 95
	9.	5 Uncut, 5, 1; 5.00, l. ½—2.50	12 50		
		70 Cloth, 20, 1; 10, 2 to 6; 5.00, l. ½—2.50	175 00		
		10 ½ mor., 10, 6; 7.00, l. 45 %—3.85	38 50		
		Box, .85 & carting, .50	1 35		
					227 35
	9.	To interest on note dated Nov. 1			7 75
	12.	50 Parts, 5, 51 to 60; .50 l. ½—25			12 50
	23.	To interest on note			7 75

Dec.	1.	10 Uncut, 5: 2, 5; 5.00, l. ½—2.50	25 00	
		20 Cloth, 10: 2, 3; 5.00, l. ½—2.50	50 00	
		250 Library, 40, 1; 75, 2; 60, 3; 50, 4; 25, 5; 6.00, l. 45 %—3.30	825 00	
		35 ½ mor., 5: 1, 2; 15, 3; 5: 5, 6; 7.00, l. " —3.85	134 75	
		4 boxes, 3.20; carting, .50	3 70	
				1,038 45
	17.	5 Uncut, 5, 4; 5.00, l. ½—2.50	12 50	
33		45 Library, 25, 1; 20, 5; 6.00, l. 45 %—3.30	148 50	
		30 ½ mor., 5, 1; 10, 2; 5, 3; 5, 6; 7.00, l. " —3.85	115 50	
		Box, .80 & carting, .50	1 30	
				277 80
1878.				
Jan'y	1.	3 Uncut, 3, 2; 5.00, l. ½—2.50	7 50	
		45 Cloth, 25, 1; 15, 2; 5, 3; 5, 6; 5.00, l. "—2.50	137 50	
		225 Library, 50, 1; 70, 2; 40, 3; 30, 4; 15, 5; 20, 6; 6.00, l. 55 %—3.30	742 50	
		2 ½ mor., 2, 4; 7.00, l. " —3.85	7 70	
		4 cases, 3.40 & carting, .50	3 90	
				899 10
	9.	To interest on note		2 10
	17.	50 Cloth, 10, 1; 5: 2, 3; 10: 4, 5, 6; @ 5.00, l. ½—2.50	125 00	
		60 Library, 20, 1; 10: 3, 4, 5, 6; 6.00, l. 45 %—3.30	198 00	
		15 ½ mor., 5: 2, 4, 6; 7.00, l. " —3.85	57 75	
		2 boxes, 1.45; carting, .50	1 95	
				382 70
	23.	5 Uncut, 5, 3; @ 5.00, l. ½—2.50	12 50	
		35 Cloth, 10, 1; 5, 2 to 6; 5.00, l. ½—2.50	87 50	
		65 Library, 20, 1; 10, 2; 3, 4; 15, 5; 6.00, l. 45 %—3.30	214 50	
		5 ½ mor., 5, 1; 7.00, l. " —3.85	19 25	
		2 boxes, 1.45 & carting, .50	1 95	
				335 70
Feb'y	1.	5 Uncut, 5, 3; 5.00, l. ½—2.50	12 50	
		90 Cloth, 15, 1; 25, 2; 15: 3, 4; 10: 5, 6; 5.00, l. 50%—2.50	225 00	
		205 Library, 30, 1; 50, 2; 40, 3; 30: 4, 5; 25, 6; 6.00, l. 45%—3.30	676 50	
		25 ½ mor., 5: 1, 2, 3, 5, 6; 7.00, l. " —3.85	96 25	
		5 cases, 3.65 & carting, .50	4 15	
				1,014 40
	9.	To interest on note rec'd this day		8 50
	13.	50 Library, 20, 1; 10: 2, 4, 5; 6 vol., l. 45 %—3.30	165 00	
		5 ½ mor., 5, 2; 7.00 " —3.85	19 25	
		Box, 75 & carting, .50	1 25	
				185 50
	18.	To interest on note		10 00
	19.	6 Library, 1, 1 to 6 by ex. to Jno. Carroll; 6.00, 45 %—3.30		19 80
	21.	15 Cloth, 5, 1; 10, 2; 5.00, l. ½—2.50	37 50	
		20 Library, 10: 3, 6, 6.00, l. 45 %—3.30	66 00	
		25 ½ mor., 5, 1 to 5; 7.00 " —3.85	96 25	
		Box, 80 & carting, .50	1 30	
				201 05
	23.	80 Library, 20: 1, 2; 10, 3 to 6 @ 6.00, l. 45 %—3.30	264 00	
		Boxes, 1.10 & carting, .50	1 60	
				265 60
March	1.	21 Uncut, 21, 7 @ 5.00, l. ½—2.50	52 50	
34		85 Cloth, 85, 7; 5.00, l. ½—2.50	212 50	
		3 Vols, parts, 3, 7; 5.00, l. ½—2.50	7 50	
		100 Library, 100, 7; 6.00, l. 45 %—3.30	330 00	
		50 ½ mor., 50, 7; 7.00, l. 45 %—3.85	192 50	
		4 ½ Calf, 40, 8; 8.00, l. 45 %—4.40	17 60	
		Boxes, 3.15 & carting, .50	3 65	
				816 25
		Shipped by Union line, Feb'y 26, 1878.		
	1.	6 Uncut, 3: 1, 2; 5.00, l. ½—2.50	15 00	
		75 Cloth, 15: 1, 2, 3; 10: 4, 5, 6; 5.00, l. ½—2.50	187 50	

		405 Library, 30, 1; 40, 2; 3, 4; 30, 5; 25, 6; 200, 7; 6.00, l. 45 %—3.30	1,336 50		
		40 ½ mor., 40, 7; 7.00, l. 45 %—3.85	154 00		
		9 boxes, 6.30 & carting, 1.00	7 30		
				1,700 30	
	9.	To interest on note		9 30	
	13.	8 Uncut, 3, 6; 5, 7; @ 5.00, l. ½—2.50	20 00		
		20 Cloth, 10, 1; 4; " 5.00, l. ½—2.50	50 00		
		55 Sheep, 20: 1, 2; 15, 3; " 6.00, l. 45 %—3.30	181 50		
		25 ½ mor., 5, 6; 20, 7; " 7.00, l. 45 %—3.85	96 25		
		2 boxes, 1.30 & carting, .50	1 80		
				349 55	
	20.	70 Cloth, 10, 1 to 7 @ 5.00, l. ½—2.50	175 00		
		90 Library, 20: 1, 2, 3; 10: 4, 5, 6; 6.00, l. 45 %—3.30	297 00		
		3 cases, 1.95 & carting, .50	2 45		
		1 Library, 1, 5; forward March 15, 1877, for J. N. Brainard	3 00		
				477 45	
	23.	48 " 48, 1 @ 6.00, l. 45 %—3.30	158 40		
		Box, 65 & carting, .50	1 15		
				159 55	
April	1.	5 Uncut, 5, 4; @ 5.00, l. ½—2.50	12 50		
		125 Cloth, 25, 1; 20: 2, 3; 15: 4, 5; 10, 6; 20, 7, @ 5.00, l. ½—2.50	312 50		
		270 Sheep, 50: 1, 2, 3; 35, 4; 30, 5; 25, 6, 30, 7, @ 6.00, l. 45 %—3.30	891 00		
		75 ½ mor., 10: 1, 2, 3, 4, 5, 6; 15, 7; @ 7.00, l. 45 %—3.85	288 75		
		8 boxes, 5.55 & carting, 1.00	6 55		
				1,511 30	
		Forwarded M'ch 30th, 1878.			
	5.	10 Uncut, 2: 1, 2, 3; 1: 4, 5, 6, 7; 5.00, l. ½—2.50	25 00		
				25 00	
	9.	10 Cloth, 10, 1; @ 5.00, l. ½—2.50	25 00		
		30 Library, 15: 4, 5; @ 6.00, l. 45 %—3.30	99 00		
		Box, 55 & carting, .50	1 05		
				125 05	
	10.	To interest on notes rec'd this day		20 16	
May	2.	.50 Cloth, 10, 1; 20, 2; 10, 3; 5: 4, 5; @ 5.00, l. ½—2.50	125 00		
		160 Library, 10, 1; 40, 2; 50, 3; 20, 4; 30, 5; 5: 6, 7; 6.00, l. 45 %—3.30	528 00		
		Boxes, 2.80; carting, .50	3 30		
				656 30	
	10.	18 Cloth, 5, 1; 3, 2; 5, 3; 2, 4; 3, 5; 5.00, l. ½—2.50	45 00		
35		20 Library, 10, 1; 5, 4; 3, 6; 2, 7; 6.00, l. 45 %—3.30	66 00		
		2 ½ Mor. 2: 3; 7.00, l. " "—3.85	7 70		
		Box, 55c. & carting, 50	1 05		
			119 75	20,432 89	

CREDITS.

1877.				
April	10	Cr. by check	320 55	
	23	" " " this dept. Encycl. Brit. receives $320.	316 00	
May	9	" " "	113 10	
	23	" " " $125; this dept. receives	113 00	
June	9	" " "	459 75	
	23	" " "	450 00	
July	10	" " "	546 05	
	19	" " note @ 3 mo's, dated July 12th, 1877	507 33	
Aug't	9	" " check	429 85	
	23	" " note @ 3 mo's, dated Aug. 20, 1877	400 00	
Sept.	10	" " check	608 30	
	19	" " note	450 30	
Octo.	11	" " draft, 1,074.25; this dept. receives	978 40	
	23	" " check, 1,074.25. " "	978 40	
Nov.	9	Cr. by check	503 90	
	9	" " note dated Nov. 1, 1877, @ 3 mo's	507 75	
	23	" " "	507 75	
	29	" " check	134 86	

	26 " " drafts, $55.14, $175.00, $135			365 14	
Dec.	14 " " check			330 90	
	22 " " "			300 00	
	24 " " "		100 00		
	24 " " note*		325 90		
				425 90	
1878.					
Jan'y	9 Cr. by check		458 25		
	9 " " note @ 3 mo's		202 10		
				660 35	
	23 " " " "		334 10		
36	23 " " check		329 00		
				663 10	
Feb'y	11 " " "		258 75		
	11 " " note @ 3 mo's		558 50		
				817 25	
	13 " " " "			510 00	
	22 " " check			308 75	
March	9 " " "		413 35	413 35	
March	20 Cr. by mdse. Invoice March 1st, shipped Feb'y 28th, called for 40 lib'y & 20, 7 ½ mor.; the case contained 60 lib'y & no ½ mor. We therefore credit			11 00	
	22 " " check overcharged 400.00; this dep't. receives			360 00	
April	6 " " "			463 00	
	10 " " "			582 05	
	23 " " "			436 55	
May	9 " " " 428.35; this dept. receives			383 35	
	15 " " mdse damaged, vols. ret'd			35 25	
	2 cloth 2, 1; 5.00 l. ½—2.50		5 00		
	8 lib'y 4, 1; 2, 2; 2, 5; 6.00 l. 45%—3.30		26 40		
	1 ½ mor. 1, 2; 7.00 l.—3.85		3 85		
	28 Cr. by check			200 00	
					1,559 23
					4,841 66
Add. Jan'y 23d	To interest on note				5 10
May 2nd	5 inst. music, 2				
	15 " " 4, 5, 7,	80 @ 20c			16 00
	10 " " 8, 9, 10,				
					4,862 76
	Cr. by notes				4,030 96
					831 80

(Endorsed:) Filed this 23d day of September, 1878. Wm. H. Bradley, clerk.

37 *Affidavit of amount due.*

Circuit court of the United States for the northern district of Illinois, October term, A. D. 1878.

NORTHERN DISTRICT OF ILLINOIS,
State of Illinois, Cook County, ss:

JOSEPH M. STODDART
v.
MOSES WARREN.

James M. Flower, being duly sworn, says that he is one of attorneys for plaintiff in this case, and that the demand of the plaintiff in the above-entitled cause is upon a promissory note, a copy of which is

* The note rec'd was for $539.15 of which this Encyclo. Brit. dept. receives but $325.90 in order to balance Nov. a/c.

attached to the declaration herein, the original of which is in deponent's possession, and also upon an open account for goods and merchandise sold and delivered by plaintiff to defendant at his request, a copy of which is also attached to the declaration herein, and that there is due to the plaintiff from the defendant, after allowing to him all just credits, deductions and set-offs, twelve hundred and sixty-eight dollars and eighty cents, with interest upon four hundred and thirty-six dollars and fifty cents from July 20th, A. D. 1878, at 8% per annum. Deponent further says that the said defendant is a resident of said northern district of Illinois and said county of Cook.

JAMES M. FLOWER.

Subscribed and sworn to before me this nineteenth day of
38 Sept., A. D. 1878.

[SEAL.]

WM. WHELAN,
Notary Public, Cook County, Ills.

(Endorsed:) Filed Sept. 23, 1878. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 9th day of October, A. D. 1878, the said defendant, by Messrs. Higgins and Swett, his attorneys, filed in said clerk's office his pleas in said entitled cause, which said pleas are in the words and figures following, to wit:

Pleas.

(Plea of general issue withdrawn by leave of court February 12, 1879.)

* * * * * * *

And for a further plea in this behalf the said defendant says actio non, because he says the said plaintiff, before and at the time of the commencement of this suit, to wit, at the county aforesaid, was and still is indebted and liable to the said defendant in a large sum of money, to wit, the sum of thirty thousand dollars ($30,000) lawful money of the United States for and on account of his failure to perform on his said plaintiff's, part, a certain contract in writing for and on account of which and growing out thereof the notes sued on in this case were executed and delivered to said plaintiff, which said contract was executed by said plaintiff and made to and with this defendant which said
39 contract and agreement was and is in the words and figures following, to wit:

PHILADELPHIA, *Feb.* 24, 1877.

Agreement entered into this day between J. M. Stoddart and Co., of Philadelphia, Pa., and Moses Warren, of Chicago, Ill.

The said J. M. Stoddart and Co. agree to give the said Moses Warren a general agency for the sale of the American reprint of the Encyclopedia Britannica in the following territory, viz: Michigan, Wisconsin, Minnesota, Dacotah, and Iowa, excepting Burlington, the counties of Illinois north of and including Henderson, Warren, Knox, Woodford, Livingston, Iroquois, and Peoria as far south as Peoria City, but not including that city, the counties in Indiana north of and including the counties of Jay, Blackford, Grant, Howard, Carroll, White, and Benton.

And the said M. Stoddart and Co. agree to furnish the said Warren the Encyclopedia at the following rates, viz: parts at one-half the regu-

lar retail rates, or 25 cents per part cloth bound volumes at one-half the regular retail rates or $2.50 per vol.; library bound vols. at 45 per cent. from the regular retail rates or $3.50 per vol.; other styles of binding at 40 per cent. from the regular retail rates; i. e. one-half mor. vol's at $4.20 per vol.; one-half calf at $4.80 per vol.; and full mor. at $6.00 per vol.; cloth pros. books at $1.50; full mor. flex. pros. books at $3.50; specimen pages at $3.00 per 100 copies without imprint. Circulars
40 free. Boxing and carting at actual cash cost of the same to the said J. M. Stoddart and Co. Said J. M. Stoddart and Co. also agree to give to said Moses Warren the exclusive right to sell the Encyclopedia Britannica within the above-named territory during such time as said Warren shall faithfully perform his part of the agreement as hereinafter stated.

1st. Said Warren agrees to use his best endeavors to promote the sale of the Britannica in the above-assigned field.

2nd. To send to J. M. Stoddart and Co. a weekly report of the number of orders taken the week previous.

3rd. To fill no orders outside of his assigned field.

4th. To leave no volumes with book sellers to sell or display in their stores.

5th. To furnish no volumes at less than the regular retail price.

6th. To remit on the 7th day of the month one-half the amount of monthly statement for previous month and to remit on the 26th day of the month the remaining one-half of said monthly statement.

Witness our hand and seal on the day and date above mentioned.

J. M. STODDART AND CO. [SEAL.]
MOSES WARREN. [SEAL.]

Witnesses:
F. R. SYPHER.
GEO. BROOKS.

41 Which said contract was afterwards, to wit; on the 24th day of Feb., at, &c., modified or explained by a certain other writing, executed by and between said plaintiff and this defendant, which said writing was and is in the words and figures following, to wit:

"Whereas on the 24th day of Feb., 1877, an article of agreement relative to the establishing of an agency at Chicago, Ill., for the sale of the Encyclopedia Britannia, American reprint, between J. M. Stoddart and Co., publishers, and Moses Warren, and whereas differences have arisen under said agreement, now, therefore, it is declared by us that the true intent and meaning of such parts of said agreement as relates to the furnishing of stock by said J. M. Stoddart and Co., and the sale of said work to subscribers by said Moses Warren, are to the effect that J. M. Stoddart and Co. shall furnish all stock complete in the forms in which it is to be delivered to subscribers, including cloth uncut styles, and that the said Moses Warren shall order all stock in the forms and styles in which it is ordered by actual subscribers, and shall not in any manner alter, change, or rebind any stock furnished by J. M. Stoddart and Co., but shall deliver the same to subscribers in the forms and styles so furnished by J. M. Stoddart and Co.; that the weekly reports provided for in said agreement shall set forth the number of the orders taken, mentioning particularly the styles
42 of binding in which the work has been ordered by subscribers.

That the discounts provided for in said agreement shall from and after the first day of May, 1877, be as follows, viz: 45 per cent. from regular retail prices on one-half mor., one-half calf, and full mor.;

that is to say, one-half mor. for $3.85; one-half calf for $4.40, and full mor. $5.50 per copy, net, subject however to any reduction that may be hereafter made in retail prices.

This said agreement in all other respects to be and remain in full force and effect.

Witness our hand and seal this first day of May, A. D. 1877.

J. M. STODDART AND CO. [SEAL.]
MOSES WARREN. [SEAL.]

In presence of
JOHN VANSANT,
HENRY D. FIELD.

And the said agreement and explanatory supplement thereto being so made afterwards on the day of , A. D. 1877, at the county aforesaid in consideration thereof, and that the said defendant at the special instance and request of the said plaintiff had then and there undertaken and faithfully promised the said plaintiff to perform and fulfil the said agreement in all things on the defendant's part to be performed and fulfilled, he the said plaintiff undertook, and then and there faithfully promised said defendant to perform and fulfil
43 the said agreement in all things on the said plaintiff's part and behalf to be performed and fulfilled, and although the said defendant hath always from the time of the making of the said agreement performed and fulfilled all things on his part and behalf in the said agreement and supplement thereto to be performed and fulfilled, except as to the time and mode of payment of a portion of the goods, wares, and merchandise which were delivered under said agreement, and for which other modes of payment were substituted and accepted by said plaintiff without in any way changing the agreement as to the future payments under said contract to be thereafter made.

And this defendant did after the date of said original agreement, to wit, on the day and year first aforesaid, at, &c., the county aforesaid, enter upon and commence the work of procuring subscribers to the said work, and did enter upon the performance of all and singular the matters and things upon his part to be done and performed, and did proceed under said agreement and procure a large number of subscribers to the said work in said agreement mentioned, to wit: two thousand (2,000) subscribers thereto, and did, in pursuance to said agreement, take from said plaintiff a large number, to wit, two thousand copies of such volumes as were published up to the time of plaintiff's refusal to perform said contract, of said books as they were published, and
44 defendant delivered the same to his said subscribers as and for the volumes so to be published by said plaintiff under said agreement.

And this defendant saith that he has always been ready and willing to perform and complete the whole of said agreement and take the remaining volumes for his said subscribers in pursuance of the said agreement and supplement thereto, and to pay for the same according to the terms of said agreement and supplement thereto, of all of which the said plaintiff hath had notice, to wit, at the county aforesaid.

And said defendant avers that the said plaintiff was aware and well knew that the defendant herein was buying the said books under said contract, so made as aforesaid with said plaintiff, to sell to subscribers for said work only, and well knew that the said defendant had procured subscribers for said work in all or nearly all of the territory and districts of country in said contract mentioned, and had, at great

expense of time and money, through canvassers employed by said defendant to canvass said territory, and otherwise, at an expense of many thousands of dollars, procured said subscribers at the catalogue price, to wit, at the full price named in said contract, and well knew that by a breach of the said contract on the said plaintiff's part, that the said defendant could not perform or fulfil his several contracts with his subscribers to said work, and well knew that it would be impossible for
45 defendant to procure copies of said work from any other person or persons or in any way whatever, as said plaintiff had control of the entire work and of all copies of every volume thereafter to be issued, and said defendant avers that said plaintiff well knew that the failure on their part to deliver said books according to said contract would not only deprive said defendants of any and all profits upon the said volumes of said work not delivered but would also subject said defendant to large damages for a failure to deliver the remaining volumes of said work not delivered, and that said plaintiff wantonly and wilfully neglected and refused to perform said contract with a view to oppress this defendant and to break him up in his business, and to that end said plaintiff did try to procure the subscribers obtained for this defendant to take said volumes not delivered from said plaintiff to said defendant, and to induce them to refuse to take said volumes not delivered from said plaintiff to said defendant, did offer to said defendant's subscribers great inducements, and did employ a great number of canvassers to induce the subscribers so obtained by this defendant not to take any of the remaining volumes of said work, and did thereby induce a great number, to wit, more than five hundred of the defend-
46 ant's subscribers, whose names are unknown to this defendant to take said work of said plaintiff, and to refuse to take the remaining volumes from said defendant whereby this defendant was deprived of the gains and profits which he otherwise would have made, amounting in all to more than twenty thousand dollars; and said defendant avers that he is and has been for many years engaged in selling books by obtaining subscribers therefor, and employs a great number of agents and canvassers at great expense, and enjoys justly a great reputation for putting the best subscription books on the market and to his customers.

And the said defendant avers that the notes sued upon in this case, copies of which are filed with said plaintiff's declaration, were given as and for a part of the consideration money for books heretofore delivered by said plaintiff to the defendant under the said agreement, and the defendant in fact saith that said plaintiff contriving and wrongfully intending to injure the said defendant did not nor would perform the said agreement nor his said promise and undertaking, but thereby subtly and craftily deceived the said defendant in this, to wit, that the said plaintiff did not nor would deliver to this defendant the books necessary to complete the sets of the said American reprint of
47 the Encyclopedia Britannica, and did not nor would comply with his said agreement in regard to furnishing said volumes as they were published, but on the contrary thereto hath hitherto wholly neglected and refused so to do, to wit, on the 6th day of June, A. D. 1878, at the county aforesaid.

And the plaintiff further disregarding the said agreement and his said promise and undertaking, afterwards, to wit, on the 6th day of June, A. D. 1878, at, to wit, the county aforesaid, did not nor would deliver the said books nor any or either of them nor comply with his said agreement with this defendant, and thereby prevented this defendant from

fulfilling his contracts with all of his subscribers to said work, being, to wit, two thousand (2,000), which said subscribers had been procured at a great cost, to wit, the sum of twenty-five thousand dollars ($25,000), whereby this defendant hath lost and been deprived of the profits and advantages which he otherwise might and would have acquired from the completion and fulfillment of said agreement and supplement thereto, and whereby this defendant has incurred great loss and is liable to great damage to the said subscribers by reason of not fulfilling his said contract with said subscribers with all of whom he entered into a contract to supply them with said reprint of the said
48 Encyclopedia at the publisher's price as specified in said contract and supplement, which contract with said subscribers was and is to the effect and in substance as follows:

OFFICE OF MOSES WARREN,
GEN'L AGENT FOR SUBSCRIPTION BOOKS,
103 *State St., Chicago,* 187 .

The undersigned promises to deliver in good order the Encyclopedia Britannica, American reprint of ninth edition, in 21 vols. (as published), not oftener than one vol. every four months to , of , in , binding at $ per vol., payable on delivery of each vol.

MOSES WARREN,
Gen'l Agent.
By , *Canvasser.*

And this defendant avers that he will not only lose the profit on supplying the remaining volumes of said work but he will also have to pay the damage for failing to supply the remaining volumes, being to wit, being fifteen volumes of said work, which failure will render this defendant liable to pay said subscribers nearly the whole cost of those volumes already delivered, as in case the remaining volumes are not delivered those already delivered are nearly worthless, and this defendant will have to repay said subscribers nearly their whole cost for the breach of his contract with them and each of them, to
49 wit, at the county aforesaid, to his damage of $30,000 *dollars*, which said damages are due and unpaid.

And said plaintiff was at the time of the commencement of this suit, and still is, indebted to this defendant in the sum aforesaid, for the work and labor, care, diligence, and attendance of the said defendant by the said defendant and his servants, before that time, done, performed, and bestowed in and about the business of the said plaintiff, and for the said plaintiff, and at his request, and for divers materials, and other necessary things by the said defendant, and at that time found and provided, used and applied in and about the said work and labor for the said plaintiff, and at his like interest and request.

And for divers goods, wares, and merchandise sold and delivered by the said defendant to the said plaintiff, and at his like request, and for money by the said defendant before that time lent and advanced to and paid, laid out, and expended for the said plaintiff, and at his like request, and for other money by the said plaintiff before that time had and received to and for the use of the said defendant; and for other money due and owing from the said plaintiff to the said defendant for interest upon and for the forbearance of divers large sums of money due and owing from the said plaintiff to the said defendant, and
50 by the said defendant forborne to the said plaintiff for divers

long spaces of time before then elapsed, at the like special instance and request of the said plaintiff, and for other money due and owing from the said plaintiff to the said defendant upon an account stated between them, and for moneys due for the failure to deliver goods purchased of the plaintiff, which said sums of money so due and owing to the said defendant, as aforesaid, exceed the damages sustained by the said plaintiff by reason of the non-performance by the said defendant of the said several supposed promises or undertakings in said declaration mentioned, and out of which sums of money so due and owing from the said plaintiff to the said defendant, he, the said defendant, is ready and willing, and hereby offers, to set off and allow to the said plaintiff the full amount of the said damages under the form of the statute in such case made and provided; but said defendant under said statute will claim a judgment for the excess over and above said plaintiff's claim, amounting to more than thirty thousand dollars ($30,000.00), which damages are still due and unpaid; and this the said defendant is ready to verify wherefore he prays judgment for said excess, &c.

HIGGINS AND SWETT,
Defendant's Attorneys.

51 *J. M. Stoddart to Moses Warren, Dr.*

To damages for failure to deliver 2,000 copies reprint Am. Encyclopedia..... $30,000
And for damages in getting nearly 600 of the subscribers of said Warren from him.

AMENDMENT.

Joseph M. Stoddart to Moses M. Warren, Dr.

To damages for breach of contract in not delivering volumes of Encyclopedia, as per contract..... $30,000 00
To damages for inducing the subscribers obtained by said Warren for Encyclopedia to abandon their subscriptions, and thereby injuring said Warren in his business..... $10,000 00

(Endorsed:) Filed Oct. 9, 1878. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 12th day of February, A. D. 1879, in the December term, A. D. 1878, of said court, in the record of the proceedings thereof in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JOSEPH M. STODDART
v.
MOSES WARREN. } Assumpsit.

52 On motion of the defendant by his attorney leave is given him to withdraw the plea of the general issue filed herein.

Afterwards to wit, on the 17th day of February, A. D. 1879, in the said December term, A. D. 1878, of said court in the record of the proceedings thereof in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JOSEPH M. STODDART
v.
MOSES WARREN. } Assumpsit.

Now come the parties, by their attorneys, and by agreement of the parties in open court, it is ordered by the court that the causes numbers 1188 and 1255, being actions of assumpsit, wherein Joseph M. Stoddart is the plaintiff and Moses Warren is the defendant, be consolidated with this cause and tried as one cause, and upon issue joined herein, thereupon comes a jury of good and lawful men, to wit, Henry J. Farwell, W. P. Dickinson, Lorenz Baer, A. S. Barnard, Isaac W. Springer, Henry L. Bush, Pomeroy H. Goodrich, De Witt C. Adams, O. F. Warriner, Philip P. Scanlan, H. A. Wynkoop, and L. L. Guyer, who were all duly elected, tried and sworn well and truly to try said issue, and after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

53 Afterwards, to wit, on the 18th day of February, A. D. 1879, in the said December term, A. D. 1878, of said court in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JOSEPH M. STODDART
v.
MOSES WARREN. } Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf, empaneled and sworn, and after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

Afterwards, to wit, on the 19th day of February, A. D. 1879, in the said December term, A. D. 1878, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JOSEPH M. STODDART
v.
MOSES WARREN. } Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf, empaneled and sworn, and after hearing additional evidence, without concluding the same, the hour of adjournment having arrived the further trial of the cause is postponed until to-morrow morning.

54 Afterwards, to wit, on the 20th day of February, A. D. 1879, in the said December term, A. D. 1878, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JOSEPH M. STODDART
v.
MOSES WARREN. } Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf, empaneled and sworn, and by agreement of the

parties, by their attorneys, L. L. Guyer, one of the jurors herein, is excused from further service as such juror, with an agreement that the trial shall proceed with the eleven jurors, and that their verdict shall have the same force and effect as though rendered by a full panel, and after hearing the concluding evidence and a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

Afterwards, to wit, on the 21st day of February, A. D. 1879, in the said December term, A. D. 1878, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

55 JOSEPH M. STODDART } Assumpsit.
v.
MOSES WARREN. }

Now come again the parties, by their attorneys, and now come also the eleven jurors in this behalf, empaneled and sworn, and after hearing additional arguments of counsel, without concluding the same, the hour of adjournment having arrived the further trial of the cause is postponed until to-morrow morning.

And afterwards, to wit, on the 22d day of February, A. D. 1879, in the said December term, A. D. 1878, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JOSEPH M. STODDART } Assumpsit.
v.
MOSES WARREN. }

Now come again the parties, by their attorneys, and now come also the eleven jurors in this behalf, empaneled and sworn, and after hearing the concluding arguments of counsel and receiving the instructions of the court, the said jurors returned the following verdict, to wit: We the jurors aforesaid find the issue for the plaintiff, and assess his damages to the sum of twenty-nine hundred and seventy-six dollars and fifteen cents.

56 It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant the said sum of twenty-nine hundred and seventy-six dollars and fifteen cents his damages so as aforesaid assessed, together with his costs and charges in this behalf expended, amounting to the sum of fifty-seven dollars and ninety-three cents, and that he have execution therefor.

And on the same day, to wit, the 22d day of February, A. D. 1879, on the hearing of said cause the following exceptions were taken and allowed by the court and made of record in said entitled cause, to wit:

Bill of exceptions.

57 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States in and for the northern district of Illinois. Of the December term, A. D. 1878.

JOSEPH M. STODDART
vs.
MOSES WARREN. } In assumpsit.

Bill of exceptions.

Be it remembered that on the trial of this cause at the December term of said circuit court of the United States for the northern district of Illinois, A. D. 1879, the said Moses Warren, the defendant, to sustain the plea of set-off filed by him, and to maintain the issue on his part, gave in evidence to the jury aforesaid the letter of Joseph M. Stoddart, of Jan. 30, 1877, as follows:

PHILADELPHIA, *Jan.* 30, 1877.

MOSES WARREN, Esq.,
103 *State St., Chicago, Ill.:*

DEAR SIR: Yours of the 27th has been rec'd. Our best terms to general agents for Brittan'ica are as follows, viz:

Parts 25c.			each	on	50 %	from	the	retail	price.
Cloth vols.	$2.50		"	"	"	"	"	"	"
Library "	3.30		"	"	45 "	"	"	"	"
½ mor. "	4.20		"	"	40 "	"	"	"	"
½ calf	4.80		"	"	"	"	"	"	"

58 Full mor. $6.00 each on 40 % from the retail price.
Circulars with imprint $8.00 per M.
Spec. pages 3.00 " 100.
Boxing and carting, what the actual cost is to us.

Agents must agree to the following:

1. To use their best endeavors to promote the sale of the work in the territory assigned.

2. To send in without fail each week a weekly report, stating the number of orders, in the different styles of binding, secured the week previous.

3. To fill no orders outside their assigned field.

4. To leave no vols. with booksellers to be sold over their counters, or to be canvassed for in their stores.

5. To furnish no vols. at less than the regular retail price.

6. To remit to us the first of each month, by dr'ft on N. Y. or Phila., on rec'pt of our monthly statement, the amount due us for all bills sent the preceding month. It is also to be understood that no goods are to be returned to us unless it is shown they were not in good order when shipped by us.

John Carroll, of your city, is the party who has taken orders there for the Brittan'ica. By agreement made with him last Aug. in case he should give up the business, his orders were to come into
59 our possession. We are to pay him 12½ % of the retail price of vols. to be delivered, and the delivering by us of one vol. is to prove the order, when it is understood he is to be paid. We hold

notes against said Carroll to the amount of $1,000. On rec'pt of the $1,000 we would be willing to give up the notes and leave the party taking the orders to settle with said Carroll, provided an arrangement could be made with Carroll. He will probably give you particulars. Should you desire to work Britannica in accordance with above terms we will draw up a contract and forward for you to sign. Excepting the assignment of territory, the only thing in addition to above which it would be necessary to introduce in the contract would be the terms on which we would take your orders in case you should not go through with the work. As the orders would be your property, we must ask you to say what you would take for them. We think all these contingencies should be provided for at the start. The counties in Ill. we could give you are all counties north of and including Henderson, Warren, Knox, Woodford, Livingstone, Iroquois, & Peoria as far south as Peoria City, but not including that city. All of Iowa excepting Burlington, and all of Wisconsin and Minnesota.

The success of the Britannica is fully established. Our 5th vol. is nearly ready. Orders are coming in better than ever before. Whoever takes it for the territory mentioned above will have a good business for years. We shall hope to hear from immediately.

Several parties have been corresponding with us, to none of whom have we given terms. We wish the matter settled as soon as possible, as it can no longer be said we have not vols. enough out to make a good show and a good beginning. Please let us know your decision at once.

Very truly, yours,

J. M. STODDART & CO.
B.

& the letter of Stoddart to Warren Feb. 6th, 1877, as follows:

PHILADELPHIA, *Feb.* 6, 1877.

MOSES WARREN, Esq.,
103 *State St., Chicago, Ill.:*

DEAR SIR: We have yours of the 3rd. In ours of the 30th ult., we gave you our best terms, the very lowest we ever do give, or ever have given, any one, & from which we cannot deviate. As we suggested, we will draw up a contract & send it on for your acceptance and signature. You can have Mr. Carroll's orders by paying in the $1,000 and settling with him for what balance may hereafter be due him. The whole thing is so clear that we do not see why it should be necessary for us to visit you. Our fifth vol. will be ready in a short time, and when it comes we shall be very busy. Please let me hear from you by return mail, as if anything is to be done we wish it done before the fifth volume is issued.

Very truly, yours,

J. M. STODDART & CO.
B.

Also the letter of Stoddart to Warren of March 10th, 1877, as follows:

MOSES WARREN, Esq.,
103 *State st., Chicago, Ill's:*

DEAR SIR: We this a. m. rec'd your postal-card of the 7th, and your telegram of the 9th. The telegram reads "express five each, volume

one and five Brittan'ica sheep." So we take it you wish 10 vol's—5, 1 & 5, 5—and have to-day sent them, as per enclosed bill. The memorandum made when you were here is, Mr. Warren to send us assignment of contract with Carroll.

Check for	$333 33		
Note "	333 33	3	mo's.
" "	333 34	4	mo's.
	$1,000 00		

John Carroll's three notes are as follows:

$285.50 due June 4, 1877.
214.80 " Aug. " "
499.70 " Sept. 8, "

We trust the matter will be adjusted as soon as possible, as we are anxious to have the 5th vol. delivered.

Very truly, yours,

J. M. STODDART & CO.
B

Also the letter of Stoddart to John Carroll of Feb. 24, 1877, as follows:

Mr. JOHN CARROLL, *Chicago:*

PHILADELPHIA, *Feb. 24th*, 1877.

DEAR SIR: Having been informed by Mr. Moses Warren, of Chicago, that you desire to assign to him, your contract with us, bearing
62 date August 2nd, 1876, and to sell him all your right, title, and interest in and under that contract, provided, we consent to such assignment, we take this method of informing you that we give our assent to such assignment, and release you from all obligations and liabilities thereunder to us, provided the sale and assignment by you to Mr. Warren, is made for the full consideration you are willing to take for the same, and in full release by you to us of all our liabilities to you, under said contract.

Yours, very truly,

J. M. STODDART & CO."

Also the letter of Stoddart to Warren of March 15, 1877, as follows:

Mr. MOSES WARREN, *Chicago:*

DEAR SIR: We are in receipt of yours of 13th inst. inclosing assigned contract of John Carroll; also, his old contract; thanks.

Also, we find your check for	$333 34			
" note "	333 33	@	3 mo.	from M'ch 3, '77.
" " "	333 33		4 mo.	" " " "
	$1,000 00			

In exchange for which, we send you herein, John Carroll' notes to our order, as follows:

One @ one year from June 1st, 1876	285 50
" " one " " Aug. 8, 1876	214 80
" " one " " Sept. 5, 1876	499 70
	$1,000 00

Which by agreement, you will understand balances each other exactly. We forward the orders for Encyclo.; but in another envelope, with this package by express, also, duplicate contract, with Carroll, cancelled as requested.

63 With kind regards,

J. M. STODDART & CO.

Said Warren further offered in evidence, the contract or agreement, between Stoddart & Co., of Philadelphia, and Moses Warren of Chicago, dated Feb. 24th, 1877, which was read in words as follows:

PHILADELPHIA, *Feb'y* 24, 4877.

Agreement entered into, this day, between J. M. Stoddart & Co., of Phil'a, Pa., & Moses Warren of Chicago, Ill. The said J. M. Stoddart & Co., agree to give the said Moses Warren, a general agency for the sale of the American reprint of the Encyclopedia Britannica, in the following territory, viz: Michigan, Wisconsin, Minnesota, Dacotah & Iowa, excepting Burlington, the counties in Illinois north of and including, Henderson, Warren, Knox, Woodford, Livingstone, Iroquois & Peoria as far south as Peoria City, but not including that city. The counties in Indiana north of & including the counties Jay, Blackford, Grant, Howan, Carroll, White & Benton. And the said J. M. Stoddart & Co. agree to furnish the said Moses Warren, the Encyclopedia Britannica at the following rates, viz: Parts at ½ the regular retail rate, or 25c. per vol. Cloth bound vol's, at ½ the regular retail rates, or $2.50 per vol. Library bound vol's, at 45 % from the regular retail rates, or $3.30 per vol. Other styles of binding at 40 % from the regular retail rates, i. e., ½ mor. vol's @ $4.20 per vol. ½ calf @ 4.80 per vol., and full mor. @ $6 per vol.; clo. pros. book @ $1.50,

64 full mor. fler. bro's book @ $3.50, specimen pages @ $3.00 per 100 copies, without imprint; circulars free; boxing and carting, the actual cash cost of the same to said J. M. Stoddart & Co. Said J. M. Stoddart & Co., also agree to give said Moses Warren the exclusive right to sell the Ency' Britannica, within the above-named territory, during such time as said Warren shall faithfully perform his part of the agreement, as hereinafter stated.

1st. Said Moses Warren agrees to use his best endeavors to promote the sale of the Britannica in the above assigned territory.

2d. To send to said J. M. Stoddart & Co., a weekly report of the number of orders taken the week previous.

3d. To fill no orders outside his assigned field.

4th. To leave no vol's with booksellers to sell or display in their stores.

5th. To furnish no vol's at less than the regular retail price.

6th. To remit on the 7th day of the month, ½ the amount of monthly statement for previous month, and to remit on the 20th day of the month, the remaining ½ of said monthly statement.

Witness our hand and seal on the day and date above mentioned.

[SEAL.] J. M. STODDART & CO.
MOSES WARREN.

Witness:
J. R. SYPHER.
GEO. BROOKS.

Defendant further offered the supplement *to* dated 1st May,
65 1877, in the words and figures following, to wit:

Whereas, on the twenty-fourth (24th) day of February, A. D. 1877, an article of agreement relative to the establishment of an agency at Chicago, Ill., for the sale of the Encyclopedia Britannica, American reprint, between J. M. Stoddart & Co., publishers, and Moses Warren; and

Whereas, differences have arisen under said agreement, now, therefore, it is declared by us that the true intent and meaning of such party of said agreement as relates to the furnishing of stock by said J. M. Stoddart & Co., and the sale of said works, to subscribers, by said Moses Warren, are to the effect that J. M. Stoddart & Co. shall furnish all stock complete, in the forms in which it is to be delivered to subscribers, including cloth, uncut style, and that the said Moses Warren shall order all stock in the forms and styles in which it is ordered by actual subscriber, and shall not, in any manner, alter, change, or rebind any stock furnished by J. M. Stoddart & Co., but shall deliver the same to subscribers in the forms and styles so furnished by J. M. Stoddart & Co.

That the weekly reports provided for in said agreement shall set forth the number of orders taken, mentioning particularly the styles of binding in which the work has been ordered by subscribers.

That the discounts provided for in said agreement shall, from and after the first day of May, 1877, be as follows, viz: Forty-five per
66 cent. (45 %) from regular retail price, on ½ morocco, ½ calf, & full morocco; that is to say, ½ morocco, $3.85; ½ calf, $4.40, and full morocco, $5.50 per copy net, subject, however, to any reduction that may be hereafter made in retail prices.

The said agreement in all other respects to be and to remain in full force and effect.

Witness our hands and seals this first day of May, A. D. 1877.

[SEAL.] J. M. STODDART & CO.
MOSES WARREN.

In presence of—
JOHN VANSANT,
HENRY D. FIELD.

Defendant Warren then offered in evidence the testimony of himself and others, tending to prove that he, Warren, entered upon the performance of said contract, and obtained, up to April 20th, 1878, 1,733 subscribers to said Encyclopedia, 21 volumes to each set, at a cost to him of over twenty-five thousand dollars, and reported the same to Stoddart, in accordance with the terms of said contract, and that he had taken about an average of four volumes on account of each set of Encyclopedia, consisting of 21 volumes to each set, amounting to some six thousand volumes, and had paid for the same according to the terms of said contract, and that he had fully complied with all his agreements in said contract.

That some time in May, 1878, a publication from the original plates was about to be introduced into the United States, of which the reprint
67 of Stoddart professed to be a copy, after which, about the 18th of May, 1878, said Warren notified said Stoddart & Co. that he thought it was not for his interest to canvas' longer for the reprint edition; that he desired to fill all the orders taken for the reprint, but for new business he desired to canvas' for the original work, whereupon said

Stoddart replied that he, Warren, could not ride two horses, and if he accepted an agency for the original edition, he, Stoddart, would not supply him, Warren, with books to fill the orders already taken.

Nothing was then decided, but negotiations were continued until June 3rd, when said Warren accepted the agency of the rival or original work, as to new business only, and made a contract with Scribner & Co., of which the following is a copy:

Articles of agreement made and entered into this 20th day of January, A. D. 1879, by and between Charles Scribner's Sons, of the city of New York, and State of New York, and Moses Warren, of the city of Chicago, and State of Illinois, witnesseth:

That in the ordinary course of business in selling the Encyclopedia Britannica, Edinburg subscription edition, the said Warren becomes possessed of volumes of what is termed the "American reprint" of said Encyclopedia Britannica, for which latter volume the said Scribners to purchase of the said Warren at the following rates, delivered in
68 said city of Chicago, viz: Cloth-bound vol's, at $1.75 each; library leather-bound vol's, at $2.10 each; half mor'c. bound vol's, at $2.20 each; half calf-bound vol's, at $2.30 each, and $1.75 for every ten parts or numbers of said "American reprint."

[SEAL.] CHARLES SCRIBNER'S SONS,
Per S. L. HALL.
MOSES WARREN.

Articles of agreement made and entered into this 14th day of May, 1878, by and between Scribner & Armstrong, surviving partners of Scribner, Armstrong & Co. of the city and State of New York, parties of the first part, and Moses Warren of the city of Chicago, State of Illinois, party of the second part, witnesseth:

That the said parties of the first part being the sole purchasers and importers for the United States, of the "subscription edition of the Encyclopedia Britannica," published by Adam & Charles Black, Edinburgh, Scotland, hereby agree to give said party of the second part, the exclusive right to sell the above named publication, until completed, in the following territory, to wit, the States of Michigan, Wisconsin, Minnesota and Iowa; the counties of Pike, Scott, Morgan, Sangamon, Christian, Shelby, Coles, Edgar and all counties north of same in the State of Illinois. Also, the counties of Warren, Fountain, Montgomery, Boone, Hamilton, Madison, Delaware, Randolph and all counties north of same in the State of Indiana.

The said parties of the first part agree to furnish stock to fill all orders taken by said party of the second part, or by his agents, for
69 said publication in said territory, at the following prices, to wit, cloth binding, five doll's per vol.; library leather binding, six doll's per vol.,; half calf binding, seven doll's per vol., and half Russia binding, eight doll's per vol.; less a uniform discount of forty-five per cent. (45%) from above prices, subject to any reduction that may be hereafter made in retail prices, or of increased discounts to general agents. Also, to furnish all specimen books, specimen pages and circulars, free of charge; boxing and cartage to be charged at actual cost price.

The said party of the second part agrees to pay for all stock ordered by him in sixty days from date of invoice and bills of lading.

The said party of the second part further agrees:

1st. To use his best endeavors to promote the sale of said publication in his assigned field.

2nd. To make weekly reports of the number of orders taken in the different styles for the week previous, to enable parties of the first part to keep sufficient stock on hand to fill all orders promptly.

3rd. To confine his canvas' for said publication exclusively within the territory named herein.

4th. To leave no volumes with booksellers to sell or display in their stores.

5th. To furnish no volumes to subscribers at less than the regular retail prices.

Said party of the second part further agrees not to canvas' from and after this date for the sale of any Encyclopedia, or for any edition of any Encyclopedia, other than the one named herein, to wit, the
70 subscription edition of the Encyclopedia Britannica, published in Edinburgh, as aforesaid, but shall have the privilege of completing orders already taken for the "reprint edition," published by J. M. Stoddart & Co., to all subscribers therefor.

Said parties of the first part agree to fill all orders received from said party of the second part as fast as stock is received from the Edinburgh publishers, and in case this contract is terminated from any cause, said parties of the first part hereby agree to supply stock to complete all orders taken by said party of the second part prior to the time of such termination, at the prices and terms in force at that time.

Witness our hands and seals at the city of Chicago and State of Illinois, the day and year above written.

SCRIBNER & ARMSTRONG, [SEAL.]
Per S. L. HALL, *Att'y in fact.*
MOSES WARREN. [SEAL.]

And thereupon said Stoddart refused to furnish said Warren with any books to fill the old orders, or subscriptions, being the 1,733 subscriptions reported to said Stoddart, except for the present, and then only on terms of cash accompanying the order.

Defendant Warren then offered in evidence the letter of June 6th, 1878.

PHILADELPHIA, *June 6th*, 1878.

MOSES WARREN, CHICAGO:

DEAR SIR: You are indebted to us in the sum of $4,864.76 for part of which the sum of $4,030.96, we hold your promissory
71 notes. The 2 notes sent us by you May 25th, amounting to to $650, in lieu of cash, are not so accepted. We must ask you to remit a draft covering these notes, and also covering the balance on book account and not included in the notes, amounting to $815.80, together $1,465.80. As to all future orders, for the present they will be filled when cash accompanies the orders.

Respectfully yours,

J. M. STODDART & CO.

Order for books of June 1st, 1878.

CHICAGO, *June* 1, 1878.

MESSRS. J. M. STODDART & CO.,

Please forward to us the following:

Encyclopedia Britannica: cloth, 1, 3; 2, 14; 3, 16; 4, 5; 5, 8; 6, 13; 7, 6: sheep, 15, 50; 44, 44; 26, 31; 21: half turkey mor., 4; 2, 2.

Shipping directions, Star Union Line.

MOSES WARREN.

(Written across the face:) Duplicate original forwarded by mail on above date.

Which said Warren testified was duly sent, & that said figures meant the No. of volumes wanted of each kind, and the number of the volume wanted.

Also the telegrams of June 5th, as follows:

JUNE 5, 1878.

J. M. STODDART & Co., 723 *Chesnut st., Philadelphia:*

Have you filled my last order, or will it be filled immediately. Answer.

MOSES WARREN.

Not ans'd, see letter 6th June.

Also the telegram of June 7th, 1878, as follows:

JUNE 7, 1878.

J. M. STODDART & Co., 723 *Chesnut st., Philadelphia:*

Do you refuse to supply me stock to fill my orders for Encyc.
72 reprint. If not answered immediately I shall understand that you do.

MOSES WARREN

Also telegram of June 10th, 1878, as follows:

JUNE 10, 1878.

J. M. STODDART & Co., 723 *Chestnut st., Philadelphia:*

I am desirous of delivering reprint fast as possible on my orders heretofore taken for same. If my orders for stock are filled, they shall be paid for according to contract. Do you intend to fill my orders on that basis?

Answer!

MOSES WARREN.

Also telegram of June 19th, 1878, as follows:

"(West. Union.)

JUNE 19, 1878.

J. M. STODDART & Co., 723 *Chestnut st., Philadelphia:*

I desire to notify you that in consequence of your refusal to perform your contract with me, I shall hold you responsible for any and all damages which I may sustain.

31, paid, h'f rate.

MOSES WARREN.

And also replies thereto, copies of which are as follows:

Received at 128 Washington st. Dated Phila., Pa., June 7th, 1878.

To MOSES WARREN, 103 *State st.:*

We will supply you stock upon conditions written you to-day.

J. M. STODDART & CO.

128 WASHINGTON ST., *June 11th*, 1878.

Dated Phila., Pa.

To MOSES WARREN, 103 *State st.:*

Will fill order when cash is rec'd, in accordance with our letter of June sixth.

J. M. STODDART & CO.

73 Said Warren offered evidence tending to show that said encyclopedia, reprint edition, consisted of 21 volumes to each set when completed, could not be purchased in the markets, and that this fact was known to both parties, and that said Warren could not purchase any substitute therefor except the Scribner edition, otherwise known as the Hall book, and so designated on the trial, and that the profits on four hundred and eighty orders, based upon the difference between the contract prices and the price to his subscribers, less the cost of delivery, which, on that basis. amounted to $20,073.80; and offered evidence tending to show the damage, on twelve hundred and fifty-three sets of the encyclopedia to be only $12,206.45, in consequence of said Warren's reducing the damages by exchanging the original works for said reprint works subscribed for; and evidence tending to show that the damages sustained by him amounted to $32,280.25, less the amount of the plaintiff's account, amounting to $2,976.15, and tending to show that the balance due him by reason thereof was $29,304.10, and after the introduction of said evidence the court proceeded to instruct the jury in the words following:

74 GENTLEMEN OF THE JURY: The suit on trial embraces three original suits commenced by the plaintiff against the defendant for the recovery of the amount due upon the promissory notes and accounts described in the declaration in each of the respective cases.

There is no dispute as to the amount due the plaintiff from the defendant on these claims, the total amount due upon the several notes and upon accounts aggregating the sum of $2,976.26, and it is conceded that the plaintiff is entitled to a verdict for that amount, and unless the defendant has established by his proof a legal right to the set-off, pleaded by him as a defense herein, the plaintiff will be entitled to just that amount as his verdict. Indeed the usual method of trying a cause in court has been reversed in this case, the defendant admitting the plaintiff's demand, and the only controversy being on the set-off claimed by the defendant.

The defendant's demand against the plaintiff which he seeks to set-off against the plaintiff's demand, and for the balance of which (after deducting the plaintiff's demand) he seeks a judgment against the plaintiff, is for the damages which the defendant insists he has

75 sustained by the breach by the plaintiff of a contract between the parties. It is admitted that the plaintiff is, and for some years past has been, in business in Philadelphia as a book publisher; that about four years ago he embarked in the enterprise of reprinting in this country the ninth edition of the Encyclopedia Brittanica' which Messrs. Black & Company, of Edinburg, Scotland, had lately commenced to issue in Great Britain. The original English work was to be issued in twenty-one volumes, samples of which have been exhibited to you on this trial, and the plaintiff's plan was to reprint these volumes in this country as fast as they appeared from the English press.

The plaintiff's plan also was to sell this work only by subscription, which subscriptions were to be obtained by agents and canvassers to whom certain territory was to be allotted and assigned, and it was expected the work would be printed and issued at about the rate of three volumes per year of one volume every four months. The defendant has for many years past been engaged in business in the city of Chicago as an agent for the sale of subscription books, that is, books sold only by subscription.

About the 24th of February, 1877, a contract in writing was entered

into between the plaintiff and defendant, whereby the defendant was appointed the general agent of the plaintiff for the sale of this
76 American reprint of the Encyclopedia Britannica, in the States Michigan, Wisconsin, Minnesota, Dakota, Iowa (except the city Burlington), and certain counties in Illinois and Indiana, which it is not necessary to enumerate, upon certain terms which are set forth in the contract. The defendant entered upon the performance of this contract, and up to the 20th of April, 1878, had obtained and reported to the plaintiff subscription for 1,733 sets of this work, and delivered to the subscribers so obtained a portion of the volumes of the work which had been issued up to that time, the testimony of the defendant tending to show that there had been on an average of less than four volumes delivered to each subscriber. After the plaintiff had got well launched in his enterprise, and as would appear from the proof in the latter part of the year 1877, or the fore part of 1878, the Scotch publishers of the Britannica, in connection with the house of Scribner, Armstrong and Company, of New York, organized a project for a competing edition in this country to the plaintiff's reprint by striking off sheets from the original stereotype plates and engravings of the English edition and sending them to this country to be bound and sold by subscription in substantially the same way as Stoddart had planned to put his reprint edition into circulation here, a Mr. Hall being made the manager for the sale of this English edition, and which, for brevity, I will call the Hall edition.

77 Some time in May, 1878, and perhaps earlier, negotiations commenced between Hall and the defendant which resulted in the defendant's accepting the general agency for the Hall edition for about the same territory covered by the contract between the plaintiff and defendant for the reprint edition of this encyclopedia, and the defendant refused to canvas further for the plaintiff's reprint edition.

Upon the defendant's refusal to further canvass for the plaintiff's book, the plaintiff refused to furnish the defendant, except for cash on delivery, material with which to fill the subscriptions which the defendant had obtained for the plaintiff's reprint edition, and upon this alleged refusal of the plaintiff to furnish stock to the defendant upon the terms called for in the written contract for filling those subscriptions arise the damages in question claimed by the defendant.

It appears from the defendant's proof that after the alleged refusal of the plaintiff to supply books for filling the orders the defendant had taken of the reprint edition the defendant sent canvassers over his territory and induced twelve hundred and fifty-three of the subscribers to the reprint edition to exchange their subscription of the reprint for a subscription to the Hall edition, and the defendant claims that he has expended in obtaining these exchanges an average of four dollars
78 for each subscription, making a total of $5,012 for the expenses in this exchange of subscription.

It is also claimed that the reprint volumes taken back from said subscribers are worth $12,206.45 less than the amount paid by the defendant to the plaintiff for them, and less than the amount which he can sell them for in the market. That the defendant has lost the profits on 480 orders not exchanged, which amounts to the sum of $20,073.80, so that the defendant's account for this damage is made up of these two items: First, the difference between the cost of the volumes which he took back from the 1,253 subscribers and what he could sell them for, which amounts to $12,206.45; secondly, the profits which the defendant claims he would have made upon the 480 still outstanding sub-

scriptions if the plaintiff had furnished him with books to fill those subscriptions, amounting to $20,073.80, making a total of $32,280.25, which the defendant' claims to recover as damages against the plaintiff for the alleged breach of this contract, less the deduction which he proposed to make of about $2,900 on account of the Carroll subscription; and for that amount, less the sum sued upon, the defendant claims a verdict at your hands.

79 Whether the defendant is entitled to recover these damages against the plaintiff is conceded to be mainly a question of law upon the construction which the court gives to the contract and to the measure of damages to which the defendant is entitled for the alleged breach of the contract. Although this contract has been often read, it may not be improper to read it in connection with the charge.

"PHILADELPHIA, *February 24th*, 1877.

"Agreement entered into this day between J. M. Stoddart and Company, of Philadelphia, and Moses Warren, of Chicago, Illinois.

"The said J. M. Stoddart and Company agree to give to said Moses Warren a general agency for the sale of the American reprint of the Encyclopedia Britannica in the following territory, namely (which I will not take time to read). And the said J. M. Stoddart and Co. agree to furnish the said Moses Warren the Encyclopedia Britannica at the following rates, namely, at one-half the regular retail rates, or $2.50 per volume; library bound volumes, at 45% from the regular retail rates, or $3.30 per volume; other styles of binding, at 40% from the regular retail price; that is, half morocco, at $4.20 a volume; half calf, at $4.80; and full morocco, at $6.00 a volume; cloth prospectus books, at $1.50; full morocco flexible prospectus books, at $3.50; specimen pages at $3.00 a hundred copies; circulars, for boxing and cart-

80 age, the actual cash cost of the same to the said Stoddart and Company. Said Stoddart and Company also agree to give said Moses Warren the exclusive right to sell the Encyclopedia Britannica within the above-named territory during said time, and said Warren shall faithfully perform his part of the agreement, as hereinafter stated.

"First. Said Warren agrees to use his best endeavors to promote the sale of the Britannica in the above-assigned territory.

"Second. To send the said J. M. Stoddart & Co. a weekly report of the number of orders taken the week previous.

"Third. To fill no orders outside his assigned field.

"Fourth. To leave no volumes with booksellers to sell or display in their stores.

"Fifth. To furnish no volumes at less than the regular retail price.

"Sixth. To remit on the 7th day of the month one-half the amount of monthly statement for previous month, and to remit on the 20th day of the month the remaining one-half of the said monthly statement.

"Witness our hands and seals, etc."

It is contended on the part of the defendant that he is not bound to continue in the execution of this contract for any specific or certain time; but that he is at liberty to suspend operations under it at any

81 time when it appears to him to be his interest to do so; but that the plaintiff is bound to supply him with books to fill all orders during the time he was engaged in working under the contract. In other words, that the defendant may, at his option, stop at any time convassing for the plaintiff's books; but that the plaintiff is bound to

supply the books to fill the orders taken upon the terms provided for in the contract, and upon this basis of a construction the defendant makes this claim for damages.

After a careful study of the contract, I am of the opinion that this undertaking was entered upon probably by the parties with the expectation that it would continue during the time that the book was to be in the process of issue; that is, during the time the entire issue was coming out; and it was also expected that during that time the defendant would continue his canvass for the work within the territory assigned, or at least that his canvass would be continued until such time as he had made a thorough and complete canvass of the field assigned to him. Still there is room for some doubt as to whether the parties, by the terms of the agreement, fixed any special time for the continuance or duration of this contract. There are, however, circumstances which might end this contract before the time which
82 the parties themselves expected it would end: first, this contract was subject to be defeated by unreasonable delay on the part of the plaintiff in publishing or pushing forward his publication, so as to supply the subscriptions which the defendant had taken in due course of his business; that is, there is an implied obligation on the part of the plaintiff to progress with the publication of this work as rapidly as circumstances will admit, and as fast as the nature of the business will allow.

After the issue of the volume in England it was the duty of the plaintiff to get out the corresponding volume in this country, and put it into the hands of the defendant for circulation, and if there was any unreasonable delay on the part of the plaintiff in doing this, no doubt the defendant would have the right to terminate the contract; so the contract is made subject to the right of the plaintiff to terminate if the defendant shall not faithfully perform it on his part. If the defendant was negligent and inattentive to his obligations to promote the sale of this book in the territory assigned to him, undoubtedly the plaintiff had the right to terminate the contract. The contract might be
83 terminated by the death of the defendant, as it is a personal understanding for the personal services of defendant, and is not assignable; so that it could not be executed either by the assignee or a successor.

Much stress has been laid in the argument upon the time for which this contract was to continue in force, but to my mind that is an immaterial question for the purposes of this case. I do not think, in other words, that it is of any essential importance to the solution of the question of damages raised in this case; that the court should determine the question whether this was a contract which continued during the entire time this book was in the progress of coming out, until the issue was completed, or whether it was determinable at the will of either of the parties.

The important question is, what are the relations of the parties in regard to these unfilled orders in case of a termination of the contract at a time prior to that which the parties expected it would continue, as no provision is made as to their rights in the case of a termination of the contract before the full completion of the issue of the entire book, and the fulfillment of the contracts with the individual sub-
84 scribers? This exigency the parties have failed to provide for and have left it for the construction of the court to say what their respective rights are, if either of them sees fit to terminate it before it is fully completed, or, to speak more accurately, what are the

relative rights of these parties toward each other upon the breach or termination of the contract, shown by the proof in this case? Because I think there is no dispute between the parties as to the substantial facts regarding the defendant's refusal to proceed further in the execution of this contract, and of the plaintiff's refusal to furnish books to the defendant to fill the orders which he had taken up to the time he elected to terminate the contract.

These facts seem to me, from undisputed proof, to be briefly these:

In the fore part of May, 1878, the defendant began negotiations with Hall for the agency of the Hall edition. He requested the plaintiff to consent that he might act as Hall's agent in the future; also to allow him to complete the orders taken for the plaintiff's reprint edition up to that time. This the plaintiff declined to do, and on the 28th of May the defendant sent the plaintiff a telegram, which was received by the plaintiff on the 29th, announcing that he, the defendant, had de-
85 cided to canvass in the future only for the Hall edition. There was some negotiation afterwards between the defendant and Mr. Brooks, the plaintiff's agent, as to whether the defendant would stand by the decision which he announced on the 28th; but the final result arrived at on the 3rd of June was that Mr. Warren would transfer his allegiance wholly to the Hall edition for future work.

In other words, the defendant terminated the contract as to all future business, and it only remained in force to any extent as to the orders which the defendant had taken up to that time, and which he thought he was bound to fill. On the first of June the defendant made an order on the plaintiff for goods to be used in filling orders which had been taken on the terms of the contract, which order plaintiff declined to fill, and on the 6th day of June the plaintiff notified the defendant that all future orders would be filled only when accompanied by the cash, or in substance the plaintiff declined to forward the defendant any more goods on credit called for by the contract, or on the terms which they had up to that time dealt, because you will notice there is no express provision for terms of credit in the contract itself.

Upon these undisputed facts the question is, had the defend-
86 ant the right to obtain a cancellation of the orders he had secured for the plaintiff's book, and substitute orders for the Hall book, and charge the expenses of so doing to the plaintiff. Upon this question I am very clear that he had no such right.

The orders in question had been obtained by the defendant as the plaintiff's agent; both parties, we may say, had an interest in them. The defendant could not without the consent of the plaintiff secure the cancellation of those orders and charge the plaintiff with the expenses he incurred in so doing. This would be a wrong towards the plaintiff, who had a right to the benefit of these orders to the extent which they had been taken. The defendant contends that he was obliged to do this in order to protect himself from the contracts he had made with his subscribers, and which he was unable to fill by reason of the plaintiff's refusal to sell him books on credit, to fill them with. It seems to me, however, that two courses lay open to the defendant in this emergency: First, to have paid the plaintiff cash for the books required to fill the orders which he had taken, for I do not think the plaintiff was bound to give the defendant credit for stock after the defendant had broken the contract; or, secondly, to have turned these orders over to the
87 plaintiff and allowed him to fill them on proper terms of equity between them. I do not agree with the defendant that he was in such peril from the contracts which he had made with these sub-

scribers as to justify the course he took in cancelling this large number of them. The contracts with the subscribers are, in my opinion, binding contracts upon the plaintiff himself, made by the plaintiff's duly authorized agent, the defendant, and it is at least doubtful to my mind whether the defendant is personally liable on them at all. In any event, he is only liable in the nature of a guarantor, or where bad faith is shown. It seems to me it would be a sufficient answer by Mr. Warren to any subscriber who demanded books according to the terms of his subscription to refer the subscriber to the plaintiff, and demand of the plaintiff in behalf of such subscriber that he should fulfil the contract which Mr. Warren had made with the subscriber as Mr. Stoddart's agent.

It would follow then that the defendant had no right to take back from the subscribers the reprint volumes he had delivered on orders, and to charge the plaintiff with the difference between what he had paid the plaintiff for those volumes and what he could sell them to Hall or Scribner, Armstrong and Company for, making the
88 item of $5,012, of $12,206.45 damages claimed.

And with regard to the 480 subscriptions still outstanding, I am equally clear that the defendant has no right to charge as damages in this case the profits he might have made in the filling of those subscriptions if the plaintiff had sold him the books on credit to fill them.

First. Because those profits are uncertain. The subscribers may not take the books when tendered to them. There is no proof that they have ever demanded a fulfillment of the orders by the defendant, and, as has been frankly suggested by defendant's counsel, a large per centage of these orders may prove wholly worthless; the parties may have died or become insolvent, or positively refuse to take the books, although they have subscribed and agreed to do so; and also they may have removed from the country, and be beyond the reach of the defendant.

Secondly. Because the defendant might have obtained the books to fill these orders by payment of the cash to the plaintiff as he needed the stock.

Thirdly. The defendant can relieve himself of all responsibility in regard to these orders by requesting the plaintiff to fill them in accordance with the terms of the contract with the subscribers.

89 It is urged that the defendant was not required to turn these orders over to the plaintiff, because he had an interest in them, but I am not prepared to say that the defendant would lose his interest in these orders by requesting the plaintiff to fill them. Probably a court of equity, if not a court of law, would protect the defendant so far as his interests in the profit of filling these orders were concerned, but that is not a material question in this case, but an important question is, was the plaintiff obliged, after the defendant had determined his contract, to entrust the defendant with the filling of these orders which the defendant had taken for the plaintiff, and after the defendant had transferred his allegiance from the plaintiff's books to that of a competing book?

The only question here is, can the defendant set off these damages claimed by him as against the plaintiff's demand here in suit?

I am of the opinion he cannot. When the defendant elected to become the agent of the plaintiff's competitor, and in effect to assume from that time forward a hostile position to the plaintiff's interests in the publication of plaintiff's books, I think the rights of the parties under this contract are
90 so far changed in regard to the completion of orders taken by

the defendant as the plaintiff's agent as to call for the application of such equitable principles as would protect both parties, inasmuch as the contract does not provide for that contingency. The plaintiff might justly doubt whether the defendant would in good faith proceed to fill all the orders taken for the plaintiff's book, and might with propriety, it seems to me, insist that he would only supply the defendant with books to fill those orders on payment of the cash, and he might also, perhaps with equal propriety, demand that the subscriptions which had been obtained should also be turned over to the plaintiff himself, or some third person in trust, to be filled in good faith, and the profits fairly divided according to the terms of the contract. I am clear that when the defendant saw fit to terminate the contract before it was completed, and while there was no provisions for executing such orders as had been taken, that the right of defendant to credit under the contract ceased, and new terms should be made in regard to the manner in which he should be furnished with stock so required.

91 Suppose, for illustration, the defendant had died at or about the time he elected to terminate this contract. As I have already said the contract is not assignable; it cannot be sold or given over to another person to execute; it is in the nature of a personal trust, and the plaintiff might refuse to trust the executor or administrator with the means with which to complete this contract. He would be under no obligation to do that; so in the contingency which has arisen, the plaintiff being willing to continue in the execution of the contract, the defendant not being willing to do it, the defendant who has terminated his connection with the future obtaining of subscriptions for the plaintiff's book insists he has an interest in the subscriptions already obtained, but he has no right therefore to go and cancel those subscriptions, and he has no right to demand that the plaintiff shall let him have the books on credit for the purpose of filling the orders.

In this view I therefore charge you that the defendant's claims for damages cannot be allowed as against the plaintiff's claims in this suit; and that the plaintiff is entitled to a verdict at your hands for the full amount admitted to be due, $2,976.53.

92 And thereupon the defendant, by his counsel, then and there excepted to the giving of said instructions as given; and the defendant then and there excepted to so much and such parts of said charge as are in the words and the figures following, to wit:

"After a careful study of the contract, I am of the opinion that this undertaking was entered upon probably by the parties with the expectation that it would continue during the time that the book was to be in the process of issue; that is, during the time the entire issue was coming out; and it was also expected that during that time the defendant would continue his canvass for the work within the territory assigned, or at least that his canvass would be continued until such time as he had made a thorough and complete canvass of the field assigned to him. Still there is room for some doubt as to whether the parties, by the terms of the agreement, fixed any special time for the continuance or duration of this contract. There are, however, circumstances which might end this contract before the time which the parties themselves expected it would end; first, this contract is subject to be defeated by unreasonable delay on the part of the plaintiffs in

93 publishing or pushing forward his publications so as to supply the subscriptions which the defendant had taken in due course of his business; that is, there is an implied obligation on the part of plaintiffs to progress with the publication of this work as rapidly as

the circumstances will admit, and as fast as the nature of the business will allow. After the issue of the volume in England it was the duty of the plaintiff to get out the corresponding volume in this country, and put it into the hands of the defendant for circulation, and if there was any unreasonable delay on the part of the plaintiff in doing this, no doubt the defendant would have had a right to terminate the contract; so the contract is made subject to the right of the plaintiff to terminate it if the defendant shall not faithfully perform it on his part."

And the defendant then and there excepted to so much of the decision as is in the words following, to wit: "The contract is made subject to the right of the plaintiff to terminate it if the defendant shall not faithfully perform it on his part," as tending to mislead the jury.

And especially to the following words: "If the defendant was
94 negligent and inattentive to his obligations to promote the sale of this book in the territory assigned to him, no doubt the plaintiff had a right to terminate the contract;" the said words being entirely too broad, as embracing the executed part of the contract as well as the unexecuted part, and as covering all subscriptions previously obtained when it ought to be limited to the right to terminate it as to new subscriptions.

And the defendant especially then and there excepted to that part of the charge in the words following: "Much stress has been laid in the argument upon the time for which this contract was to continue in force, but to my mind this is an immaterial question for the purposes of this case. I do not think, in other words, that it is of any essential importance to the solution of the question of damages raised in this case whether the court should determine the question that this was a contract which would continue during the entire time this book was in the progress of coming out until the whole issue had been completed, or whether it was determinable at the will of either of the parties."

And then and there excepted especially to the following words and parts of said charge: "The important question is, what are the
95 relations of the parties in regard to these unfilled orders in case of a termination of the contract at a time prior to that which the parties expected it would continue, as no provision is made as to their rights in the case of a termination of the contract before the full completion of the issue of the entire book and the fulfillment of the contracts with the individual subscribers. This exigency the parties have failed to provide for, and have left it for the construction of the court to say what their respective rights are if either of them see fit to terminate it before it is fully completed. Or, to speak more accurately, what are the relative rights towards each other upon the breach or termination of the contract by either as shown by the proof in this case? Because I think there is no dispute between the parties as to the substantial facts regarding the defendant's refusal to proceed further in the execution of this contract and of the plaintiff's refusal to furnish the books to the defendant to fill the orders which he had taken up to the time he elected to terminate the contract. These facts seem to me from undisputed proof to be briefly these: In the fore part of May the defendant began negotiations with Hall for the agency of the Hall
96 edition; he requested the plaintiff to consent that he might act as Hall's agent in the future; also allow him, the defendant, to complete the orders taken for the plaintiff's reprint edition up to that time. This the plaintiff declined to do, and on the 28th of May the defendant sent the plaintiff a telegram, which was received by the plaintiff on the 29th, announcing that he, the defendant, had decided to canvass in the

future only for the Hall edition. There were some negotiations afterwards between the defendant and Mr. Brooks, the plaintiff's agent, as to whether the defendant would stand by the decision which he announced on the 28th, but the final result arrived at on the 3rd of June, that Mr. Warren would hereafter transfer his allegiance wholly to the Hall edition for future work." The defendant then and there especially excepted to these words, and especially to the words "hereafter transferred his allegiance wholly to the Hall edition for future work."

The defendant insists that if he had the right to terminate the agency as to future business that he owes no allegiance to Stoddart.

And defendant especially then and there excepted to the following portion of said charge succeeding said words: "In other words, the defendant terminated the contract as to all future business;
97 and it only remained in force to any extent as to the orders which the defendant had taken up to that time, and which he thought he was bound to fill."

And defendant especially then and there excepted to that portion of the charge in the words following: "On the 1st of June defendant made an order on the plaintiff for goods to be used in filling orders which had been taken on the terms of the contract, which order plaintiff declined to fill, and on the 6th of June the plaintiff notified the defendant that all future orders would be filled only when accompanied by the cash, or, in substance, the plaintiff declined to fo'ward the defendant any more goods on credit called for by the contract or on the terms on which they had up to that time dealt, because you will notice there is no express provision for terms of credit in the contract itself."

Defendant claims that the contract expressly provides that he shall have credit until the 7th and 20th of the following month for all goods delivered the preceding month, and that in that respect the in-
98 struction misstates the terms of the contract.

And defendant especially then and there excepted to the charge of the court in the following words: "Upon these undisputed facts the question is, had the defendant the right to obtain the cancellation of the orders he had secured for the plaintiff's book and substitute orders for the Hall book, and charge the expenses of so doing to the plaintiff, and upon this question I am very clear that he had no such right." Defendant claims that said charge is erroneous in this, that after the admitted default of the plaintiff, in not supplying the books, it was the duty of the defendant to use all possible means to mitigate the damages, and make them as light as possible, and, as it was proven, had been reduced more than one-half by said exchanges; it is clear that it was a legitimate act to so reduce the damages, and that said charge, in that particular, is erroneous.

And defendant especially then and there excepted to that portion of said charge following: "The orders in question had been obtained by the defendant as the plaintiff's agent; both parties, we may say, had an interest in these orders. The defendant could not, without the consent of the plaintiff, secure the cancellation of those orders, and charge the plaintiffs with the expenses which he incurred in so doing.
99 This would be a wrong toward the plaintiffs, who had the right to the benefit of these orders to the extent which they had been taken."

Defendant claims that this portion of the instruction was erroneous, because after the plaintiff had made default in delivering the books, in accordance with the terms of the contract, became liable to the defendant in damages for the breach of his contract with the defendant, and

because the orders were in no sense the property of the plaintiff, because, by the terms of the contract, the defendant was to buy the books from the plaintiff, and was personally responsible for them, and was to have the same on his own credit.

Said defendant further then and there excepted to that portion of the charge of the court in the words following: "The defendant contends that he was obliged to do this in order to protect himself from the contracts he had made with his subscribers, and which he was unable to fill by reason of the plaintiff's refusal to sell him books on credit to fill them with. It seems to me, however, that two courses lay open to the defendant in this emergency: First, to pay the plaintiff cash for the books required to fill the orders which he had taken, for I do not think the plaintiff was bound to give the defendant credit
100 for stock after the defendant had broken the contract; or, second, to turn these orders over to the plaintiff and allow him to fill them on proper terms of equity between them."

Defendant then and there excepted to said portion of the charge, because, he claimed, that when the plaintiff had violated his contract by refusing to deliver the books, according to the terms of the contract, he made himself liable for the damages which the defendant would sustain from such breach, and that said plaintiff had no right to require the cash to be paid for the books when the contract stipulated that the defendant should have them to deliver to his customers on a credit, which would enable him to realize the cash with which to pay for them. And because the court held that the plaintiff was not bound to give the defendant credit after the defendant had elected to discontinue taking all new orders, and because the defendant was not called upon to surrender his orders with his own customers, who had a contract with him personally for these books, to transfer his orders over to the plaintiff, said orders being his own property, contracts made with himself, and that the course suggested by the court would be only for the court to make contracts between the parties, or to compel the party who has put the other in default to go and make negotiations with him as to how the party in default might realize the greatest benefit from his default.

101 Said defendant further then and there excepted to the following portion of said charge: "I do not agree with the defendant that he was in such peril, from the contracts which he had made with these subscribers, as to justify the course he took in cancelling this large number of orders. The contracts with the subscribers are, in my opinion, binding contracts upon the plaintiff himself, made by the plaintiff's duly authorized agent, the defendant; and it is at least doubtful to my mind whether the defendant is personally liable on them at all. In any event, he is only liable in the nature of a guarantor, or where bad faith is shown. It seems to me it would be a sufficient answer by Mr. Warren to any subscriber that demanded the books, according to the terms of his subscription, to refer the subscriber to the plaintiff, and demand of the plaintiff, in behalf of such subscriber, that the plaintiff should fulfil the contract with the subscriber which Mr. Warren had made with the subscriber as his, Stoddart's, agent."

Defendant's council then and there objected and excepted to that portion of said charge, on the ground that the contract with Mr. Warren was directed to him personally, and not as an agent, and that the contract of Warren was with the subscriber personally, and that if it had been to him as agent, whatever the relations of third per-

102 sons might have been with Stoddart or Warren, the contract of Stoddart with Warren was to furnish him the books, so far as he obtained subscribers for the same, and a failure to furnish the books under that contract entitled Warren to all the damages which he, Warren, would sustain by reason thereof—all the damages that were in the contemplation of the parties, or that were the natural and necessary consequences of the breach of said contract.

And said defendant then and there excepted to the following portion of said charge: "It would follow then that the defendant had no right to take back from the subscriber' the reprint volumes which he had delivered on orders, and to charge the plaintiff with the difference between what he had paid the plaintiff for those volumes and what he could sell them to Hall or Scribner, Armstrong & Co. for, making the item of $12,206.45, less the five thousand dollars expenses."

Said defendant then and there objected and excepted to that portion of the said instruction for the following reasons: That it was the duty of said defendant Warren to make the damages to said plaintiff, Stoddart, as light as possible, and that the proof showed that the course taken by the defendant produced a very large reduction of damages, amounting to nearly thirty thousand dollars.

And said defendant then and there excepted to the following portion of said instructions: "In regard to the four hundred and eighty
103 subscriptions still outstanding I am equally clear that the defendant has no claim to charge as damages in this case the profits he might have made in the filling of those subscriptions if the plaintiff had sold him books on credit to fill them. First. Because those profits are uncertain; the subscribers may not take the books when tendered to them. There is no proof that they have ever demanded a fulfilment of the orders by the defendant, but, as has been frankly suggested by defendant's counsel, a large percentage of these orders may prove to be wholly worthless. The parties may have died, or become insolvent, or positively refuse to take the books, although they may have subscribed and agreed to do so; and also that they may have removed from the country and beyond the reach of the defendant.

"Secondly. Because the defendant might have obtained the books, to fill these orders, by the payment of the cash to the plaintiff as he needed the stock.

"Thirdly. The defendant can relieve himself of all responsibility in regard to these orders by requesting the plaintiffs to fill them, in accordance with the terms of the contract with the subscriber."

Said defendant then and there excepted to said portion of the instruction, because, he says, that by the ruling of the court the defendant is deprived of all damages; and if the damages were uncertain, by reason of the parties being insolvent, or dead, or having left the country, that was a matter affecting only the quantum of damages,
104 and so a matter for the jury to determine to what extent those circumstances should mitigate the damages, and was an absolute bar to a recovery. That profits in this, having been in the contemplation of the parties at the time the contract was made, are recoverable as such, and the price having been agreed upon at which the books were to be sold, after proving the expenses of delivery, were as certain as the law required, and were recoverable. That the court ought not to instruct the jury, when by the terms of the contract the goods were to have been sold on credit, so that the defendant might have the property to deliver and collect the money to pay the plaintiff, that because the plaintiff proposed to deliver the books upon different terms, as for

cash, that the defendant was bound to comply with such terms, which were not authorized by the contract, and because the defendant did not offer, even if that had been the case, did not propose to deliver them, only for the present. And because the court has misapprehended the contract in this case, and the law of the case, in stating that the defendant can relieve himself of all responsibility in regard to these orders by requesting the plaintiff to fill them in accordance with the terms of the contract with the subscribers, and that even if he could so relieve himself the proof shows that the defendant had ex-
105 pended twenty-five thousand dollars in procuring these orders, and he was not bound to turn them over to the plaintiff and trust to him in future years to compensate him as might please him.

And defendant then and there excepted to the following portion of said charge of said court: "It is alleged that the defendant was not required to turn these orders over to the plaintiff, because he had an interest in them, and I am not prepared to say that the defendant would lose his interest in these orders by requesting the plaintiff to fill them. Probably a court of equity, even a court of law, would protect he defendant, so far as his interests in the profit of filling these orders were concerned; but that is not a material question in this case, but an important question is, was the plaintiff obliged, after the defendant had terminated his contract, to entrust the defendant with the filling of these orders which the defendant had taken for the plaintiff, and after the defendant had transferred his allegiance from the plaintiff's book to that of a competing book." Defendants then and there excepted to that part of said instruction, and objected thereto for the following reasons: That if the defendant, Warren, had a right to discontinue procuring subscriptions in the future, and was not bound to continue in that business, he did not terminate the contract except as to future subscribers, and as to the past said contract continued
106 in force, and therefore said instruction was calculated to mislead the jury.

And because said instruction is in direct violation of the terms of said contract, which was that plaintiff should entrust the defendant with filling these orders, or furnish him the books upon the contract, which was stipulated by the terms of the contract. And because the phrase "that the defendant had transferred his allegiance from the plaintiff's book to that of the competing book" was calculated to excite prejudice against the defendant. That if the defendant was entitled to terminate the contract as to new business, he was exercising a legal right, and owed no allegiance to the plaintiffs except as to the subscribers which he had obtained, and as to these he owed no allegiance to any one. His contract was that he was to buy the books, and use his best efforts to promote the sale of them, and while he was filling subscriptions, that was his duty, and for a violation of which he was liable. And defendant then and there excepted to the following portion of said charge: "The only question here is, can the defendant set off the damages claimed by him as against the plaintiff's demand here in suit? I am of the opinion he cannot; when the defendant elected to become the agent of the plaintiff's competitor, and in effect was soon from that time upward in a hostile position to the plaintiff's interest in the pub-
107 lication of the plaintiff's book, I think the rights of the parties under this contract are so far changed in regard to the completion of the orders, taken by the defendant as the plaintiff's agent, as to call for the application of such equitable principles as would protect both parties, inasmuch as the contract does not provide for that contin-

gency. The plaintiff might justly doubt whether the defendant would in good faith proceed to fill all the orders taken for the plaintiff's book, and might with propriety, seems to me, insist that he would only supply the defendant with books to fill those orders on payment of the cash; and he might also, perhaps with equal propriety, demand that the subscriptions which had been obtained should also be turned over to the plaintiff himself, or some third person in trust, to be filled in good faith, and the profits to be fairly divided in accordance with the terms of the contract."

To which portion of the instruction, so given by the court, defendant's counsel then and there excepted and objected, and assigned as reasons therefor that the court was making a contract for the parties, and making provisions for them which they had neglected to make, and misstating the rights of the parties, as they grew out of the facts proved in the case.

And because the duty of the court was to define the measure
108 of damages, and the instruction intimates a new mode of adjustment not provided for by law nor by the parties.

And said defendant then and there excepted to the following portion of said charge: "I am clear that when the defendant saw fit to terminate the contract before it was completed, and while there was no provision for executing such orders as had been taken, that the right of the defendant to credit under the contract ceased, and new terms in regard to the manner in which he should be furnished with stock was required to be made to these parties. Suppose, for illustration, the defendant had died at or about the time he elected to terminate this contract. As I have already said, the contract is not assignable; it cannot be sold or given over to another person to execute; it is in the nature of a personal trust, and the plaintiff might refuse to trust the defendant's executor or administrator with the means with which to complete this contract. He would be under no obligations to do that. So, in the contingency which has arisen, the plaintiff being willing to continue in the execution of the contract, the defendant not being willing to do it, the defendant, who has terminated his connection with the future obtaining of subscriptions for the plaintiff's book, insists he has an interest in the subscriptions already obtained, but he has no right, therefore, to go and cancel those subscriptions; he
109 has no right to demand that the plaintiff should let him have the books on credit for the purpose of filling these orders. In this view, therefore, I charge you that defendant's claims for damages cannot be allowed, as against the plaintiff's claim in this suit, and that the plaintiff is entitled to a verdict at your hands for the full amount admitted to be due, $2,976.53."

To the giving of which portion of said instruction the defendant then and there excepted and objected, and assigned as reason for such objection that the court erroneously determined that the said defendant had no right to terminate his connection for the future obtaining of subscriptions for the plaintiff's under said contract, and that he had no right after the plaintiff had made default in the performance of his portion of the contract, which provided that he should furnish the said defendant with the said encyclopedia, to any damages for a breach on the part of the plaintiff of his part of said contract; and because the said court ruled that the said plaintiff was not bound to furnish the said defendant any books upon credit for the purpose of filling orders which had been taken while the contract was in force.

And because said portion of said instruction decides as a matter

of law that the defendant is entitled to no damages whatever.
110 To each and all of which said several portions of said instructions, the defendant, Warren, by his council, then and there excepted severally, and then and there prayed that this, his bill of exceptions, might be signed, sealed, and allowed, which is done as of the time of the trial by consent, and by stipulation of counsel for both parties.

Witness the hand and seal of the Hon. Henry W. Blodgett, district judge of said court and the presiding judge in said cause.

[SEAL.] H. W. BLODGETT,
District Judge, and the Presiding Judge in said Cause.

(Endorsed:) Filed February 22, 1879. Wm. H. Bradley, clerk.

And afterwards, to wit, on the 28th day of February, A. D. 1879, said defendant, by his attorneys, filed in said clerk's office his bond in said-entitled cause; which said bond is in the words and figures following, to wit:

Bond.

Circuit court of the United States for the northern district of Illinois.

JOSEPH M. STODDART }
vs. }
MOSES WARREN. }

Know all men by these presents that we, Moses Warren, of
111 Cook County, Illinois, and Allen, of Rockford, Winnebago County, Illinois, are held and firmly bound unto Joseph M. Stoddart, of Philadelphia, Penn., in the penal sum of five thousand ($5,000) dollars, to be paid to the said Joseph M. Stoddart, his executors, or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals; dated this 28th day of February, A. D. 1879.

Whereas the above-named Moses Warren hath prosecuted a writ of error to the circuit court of the United States for the northern district of Illinois to reverse the judgment rendered in the above-entitled action by the circuit court for the northern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named Moses Warren shall prosecute his said writ of error to effect, and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

MOSES WARREN. [SEAL.]
LOREN S. ALLEN. [SEAL.]

Sealed and delivered in presence of—
VAN H. HIGGINS.

112 The above bond is approved this 27th day of February, A. D. 1879.

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed Feb'y 28, 1879. Wm. H. Bradley, cl'k.

113 NORTHERN DISTRICT OF ILLINOIS, *sct:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a correct and complete transcript of the record of all the proceedings had in said court in the cause wherein Joseph M. Stoddart is the plaintiff and Moses Warren is the defendant, as the same appears from the files and records of said court now remaining in my custody and control, and that the original writ of error issued in this cause is hereto annexed.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 5th day of September, A. D. 1879, and of our Independence the 104th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

114 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment, in a plea which is before you in said circuit court, between Joseph M. Stoddart, plaintiff, and Moses Warren, defendant, in an action of assumpsit, a manifest error hath happened to the great damage of the said Moses Warren, as by his complaint appears, and it is being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: You are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October, A. D. 1879, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-fourth day of February, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the 103rd year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Indorsed:) Supreme Court of the United States. Moses Warren, plaintiff in error, vs. Joseph M. Stoddart, defendant in error. Writ of error.

115 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

To Joseph M. Stoddart, of Philadelphia, Penn., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, A. D. 1879, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Moses Warren is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry W. Blodgett, judge of the district court, this 27th day of February, in the year of our Lord one thousand eight hundred and seventy-nine.

H. W. BLODGETT, *Judge.*

Supersedeas bond, $5,000, with Allen as surety.

H. W. B.

116 (Indorsed:) Supreme Court of the United States.
vs. . Citation to October term, A. D. 18 .

Received a copy hereof this 28th day of February, 1879.

TENNEY & FLOWERS,
Pl'ff's Att'ys.

UNITED STATES OF AMERICA,
Northern District of Illinois,
State of Illinois, Cook County, ss:

MOSES WARREN
vs.
JOSEPH M. STODDART. } Writ of error.

Van H. Higgins, being duly sworn, deposes and says that he served a copy of the within citation upon Henry W. Tenney, one of the attorneys of the within-named Joseph M. Stoddart, by leaving a true copy of the within citation with him on the 28th day of February, A. D. 1879.

VAN H. HIGGINS.

Subscribed & sworn to before me Feb'y 28, 1879.

E. A. DRUMMOND,
U. S. Com'r.

117 Supreme Court of the United States, of October term, in the year of our Lord one thousand eight hundred and seventy-nine.

MOSES WARNER, PLAINTIFF IN ERROR,
against
JOSEPH M. STODDART, DEFENDANT IN ERROR. }

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said Moses Warner, by Messrs. Higgins, Furber & Cothran, his attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

First. That the said circuit court erred in charging and instructing the jury that the plaintiff in error was not entitled to any damages in this action.

Second. That the said circuit court erred in charging and instructing the jury that the plaintiff in error was not entitled to set-off or recoupe his damages in this action against the claims and demands of the defendant in error.

Third. That the said circuit court erred in charging and instructing the jury that the defendant's (plaintiff in error's) claim for damages cannot be allowed as against the plaintiff's (defendant's in error) claims in this action.

Fourth. That the said circuit court erred in charging and instructing the jury that the plaintiff (defendant in error) is entitled to a verdict at your hands for the full amount admitted to be due, $2,976.53.

Fifth. That the said circuit court erred in charging and instructing the jury that the plaintiff in error (the defendant in the court below) was, in the procuring of subscribers thereto and in the purchase of said books and the delivery thereof to such subscribers, the agent of said defendant in error (the plaintiff in the court below).

Sixth. And he hereby assigns as error, specially and separately, each and every part of the charge in the court below; to which exception was duly taken and entered thereto, as is shown by the said record.

And the said Moses Warner p'ays that the judgment aforesaid be avoided, annulled, and altogether held for naught, and that he be restored to all things which he hath lost by occasion of the said judgment.

HIGGINS, FURBER & COTHRAN,
Attorneys for Plaintiff in Error, 132 *La Salle Street, Chicago, Ill's.*

(Indorsement on cover:) No. 274. Moses Warren, pl'ff in error, vs. Joseph M. Stoddart. N. Illinois C. C. U. S. Filed 29 September, 1879.

SUPREME COURT U.S.
FILED
MAR 13 1882

IN THE

Supreme Court of the United States,

(No. 374.)

OCTOBER TERM, A. D. 1881.

MOSES WARREN,
Plaintiff in Error,

vs.

JAMES M. STODDART,
Defendant in Error.

Error to the Circuit Court of the United States, Northern District of Illinois.

ARGUMENT FOR PLAINTIFF IN ERROR.

VAN H. HIGGINS,

Of Counsel.

CHICAGO:
HORACE O'DONOGHUE, LEGAL PRINTER, PARKER BUILDING, 95-97 WASHINGTON STREET.
1882.

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STATEMENT OF FACTS.

Prior to February, 1877, Joseph M. Stoddart, plaintiff in the court below, and defendant in error in this court, was a book publisher in the city of Philadelphia, engaged in the general business of publishing and selling books. In the course of his business he engaged in the enterprise of reprinting in this country the ninth edition of the *Encyclopedia Britannica*, which Messrs. Black & Co., of Edinburgh, Scotland, had lately commenced to issue in Great Britain.

The original English work was to be issued in twenty-one volumes, and Stoddart's plan was to reprint these volumes in this country as fast as they appeared from the English press.

Stoddart's plan, also, was to sell this work only by subscription, which subscriptions were to be obtained by agents and canvassers, to whom certain territory was proposed by him to be allotted and assigned; and it was expected the work would be printed and issued at about the rate of three volumes per year, or one volume every four months, thus consuming, as was expected, something like seven years in the completion of that undertaking. This enterprise was entered upon by Stoddart, under the name of Stoddart & Co., about seven or eight years since. After the commencement of this enterprise, Stoddart & Co. made an arrangement with one John Carroll for a portion of the territory in the city of Chicago. Said Carroll undertook to canvass the district assigned to him, for subscribers to this reprint edition proposed to be published by Stoddart. Said Carroll commenced in August, 1876, to canvass the district assigned to him at Chicago for subscribers to this work, and continued in that employment until some time in January, 1877, and in the

course of his canvass had procured a considerable number of subscribers. Said Carroll, in the course of such employment, became indebted to Stoddart in the sum of $1,000, for which he had executed his notes to Stoddart, under the name of Stoddart & Co.

Moses Warren, the plaintiff in error, for many years prior to that time had been engaged in business in the city of Chicago and the Northwest, as a general agent for the sale of subscription books—that is, books sold only by subscription; and, as such agent, he had to employ a large number of canvassers throughout the Northwest to procure subscribers for such books as he undertook to dispose of.

On or about the 27th of January, 1877, he, after an interview with Carroll, wrote a letter to Stoddart, the defendant in error, in regard to procuring a so-called agency for the sale of the reprint of said Encyclopedia in the Northwest.

On the 30th of January, 1877, said Stoddart replied to the letter of Warren, as follows (*Printed Record, pp. 27, 28*):

PHILADELPHIA, January 30, 1877.

Moses Warren, Esq., 103 State street, Chicago, Ill.:

DEAR SIR: Yours of the 27th has been received. Our best terms to general agents for Britannica are as follows, viz.:

Parts, 25 cents each, or 5 per cent. discount from the retail price.

Cloth volumes,	$2.50,	"	"	"	"	"
Library "	$3.30,	45	"	"	"	"
½ mor. "	$3.20,	40	"	"	"	"
½ calf "	$4.80,	"	"	"	"	"
Full mor. "	$6.00,	"	"	"	"	"

Circulars, with imprint, $8.00 per thousand.

Specimen pages, $3.00 per hundred.

Boxing and carting, what the actual cost is to us.

Agents must agree to the following:

1. To use their best endeavors to promote the sale of the work in the territory assigned.

2. To send in without fail each week a weekly report, stating the number of orders, in the different styles of binding, secured the week previous.

3. To fill no orders outside their assigned field.

4. To leave no volumes with booksellers to be sold over their counters, or to be canvassed for in their stores.

5. To furnish no volumes at less than the regular retail prices.

6. To remit to us, the first of each month, by draft on New York or Philadelphia, on receipt of our monthly statement, the amount due us for all bills sent the preceding month. It is also to be understood that no goods are to be returned to us, unless it is shown they were not in good order when shipped by us.

John Carroll, of your city, is the party who has taken orders there for the *Britannica*. By agreement made with him last August, in case he should give up the business, his orders were to come into our possession. We are to pay him 12½ per cent. of the retail price of volumes to be delivered, and the delivering by us of one volume is to prove the order, when it is understood he is to be paid. We hold notes against said Carroll to the amount of $1,000. On receipt of the $1,000 we would be willing to give up the notes, and leave the party taking the orders to settle with said Carroll, provided an arrangement could be made with Carroll. He will probably give you particulars. Should you desire to work Britannica in accordance with above terms, we will draw up a contract and forward for you to sign. Excepting the assignment of territory, *the only thing in addition to above which it would be necessary to introduce in the contract would be the terms on which we would take your orders in case you should not go through with the work. As the orders would be your property, we must ask you to say what you would take for them.* We think all these contingencies should be provided for at the start. The counties in Illinois we could give you are all counties north of and including Henderson, Warren, Knox, Woodford, Livingston, Iroquois and Peoria, as far south as Peoria City, but not including that city; all of Iowa, excepting Burlington, and all of Wisconsin and Minnesota.

The success of the Britannica is fully established. Our fifth volume is nearly ready. Orders are coming in better than ever before. Whoever takes it for the territory mentioned above will have a good business for years. We shall hope to hear from you immediately. Several parties have been corresponding with us, to none of whom we have given terms. We wish the matter settled as soon as possible, as it can no longer be said we have not volumes enough out to make a good show and a good beginning. Please let us know your decision at once.

Very truly yours,

J. M. STODDART & CO.

B.

Again, on the 6th day of February, 1877, in reply to a letter of Warren's, dated the 3d of February, said Stoddart wrote to Warren, as follows (*Printed Record, p. 28*):

PHILADELPHIA, February 6, 1877.

Moses Warren, Esq., 103 State street, Chicago, Ill.:

DEAR SIR: We have yours of the 3d. In ours of the 30th ult. we gave you our best terms, the very lowest we ever do give, or ever have given any one, and from which we cannot deviate. As we suggested, we will draw up a contract, and send it on for your acceptance and signature. You can have Mr. Carroll's orders by paying in the $1,000 and settling with him for what balance may hereafter be due him. The whole thing is so clear that we do not see why it should be necessary for us to visit you. Our fifth volume will be ready in a short time, and when it comes we shall be very busy. Please let us hear from you by return mail, as if anything is to be done, we wish it done before the fifth volume is issued.

Very truly yours,

J. M. STODDART & CO.

B.

On the 24th of February, 1877, said Warren and Stoddart entered into an agreement in writing, in the words following (*Printed Record, p. 30*):

"PHILADELPHIA, February 24, 1877.

"AGREEMENT entered into this day, between J. M. "Stoddart & Co., of Philadelphia, Pa., and Moses War- "ren, of Chicago, Ill. The said J. M. Stoddart & Co. "agree to give the said Moses Warren a general agency "for the sale of the American reprint of the *Encyclo-* "*pedia Britannica*, in the following territory, viz.: "Michigan, Wisconsin, Minnesota, Dakota and Iowa, "excepting Burlington, the counties in Illinois north and "including Henderson, Warren, Knox, Woodford, Liv- "ingston, Iroquois and Peoria as far south as Peoria City, "but not including that city; the counties in Indiana "north of and including the counties of Jay, Blackford, "Grant, Howard, Carroll, White and Benton. And the "said J. M. Stoddart & Co. agree to furnish the said "Moses Warren the *Encyclopedia Britannica* at the fol- "lowing rates, viz: Parts at one-half the regular retail "rate, or twenty-five cents per volume; cloth bound "volumes at one-half the regular retail rates, or $2.50 "per volume; library bound volumes at 45 per cent. dis- "count from the regular retail rates, or $3.30 per volume.

" Other styles of binding at 40 per cent. discount from the " regular retail rates, that is, one-half morocco volumes at " $4.20 per volume, one-half calf at $4.80 per volume, " and full morocco at $6 per volume, clo. pros. book at " $1.50, full morocco flex. bro's book at $3.50, specimen " pages at $3.00 per 100 copies, without reprint; cir- " culars free; boxing and carting, the actual cost of the " same to said J. M. Stoddart & Co. Said J. M. Stoddart " & Co. also agree to give said Moses Warren the exclusive " right to sell the *Encyclopedia Britannica* within the " above-named territory, during such time as said Warren " shall faithfully perform his part of the agreement, as " hereinafter stated.

" *First.* Said Moses Warren agrees to use his best " endeavors to promote the sale of the *Britannica* in the " above assigned territory.

" *Second.* To send to said J. M. Stoddart & Co. a " weekly report of the number of orders taken the week " previous.

" *Third.* To fill no orders outside his assigned field.

" *Fourth.* To leave no volumes with booksellers to " sell or display in their stores.

" *Fifth.* To furnish no volumes at less than the reg- " ular retail price.

" *Sixth* To remit on the 7th day of the month, " one-half the amount monthly statement for previous " month, and to remit, on the 20th day of the month, the " remaining one-half of said monthly statement.

" Witness our hand and seal on the day and date " above mentioned.

" J. M. STODDART & CO. [Seal.]
" MOSES WARREN. [Seal.]

" Witness :
" J. R. SYPHER.
" GEO. BROOKS."

Which agreement was modified by a supplementary agreement, dated May 1st, 1877, and signed by said Stoddart and Warren, which supplementary agreement is in the words following (*Printed Record, p. 31*) :

" WHEREAS, On the twenty-fourth (24th) day of " February, A. D. 1877, an article or agreement relative " to the establishment of an agency at Chicago, Ill., for " the sale of the *Encyclopedia Britannica*, American re- " print, between J. M. Stoddart & Co., publishers, and " Moses Warren ; and

" WHEREAS, Differences have arisen under said " agreement ; now, therefore, it is declared by us that the " true intent and meaning of such part of said agreement " as relates to the furnishing of stock by said J. M. " Stoddart & Co., and the sale of said work to sub- " scribers by said Moses Warren, are to the effect that J. " M. Stoddart & Co. shall furnish all stock complete, in " the forms in which it is to be delivered to subscribers, " including cloth, uncut style, and that the said Moses " Warren shall order all stock in the forms and styles in " which it is ordered by actual subscribers, and shall not, " in any manner, alter, change or rebind any stock fur- " nished by J. M. Stoddart & Co., but shall deliver the " same to subscribers in the forms and styles so furnished " by J. M. Stoddart & Co.

" That the weekly reports provided for in said agree- " ment shall set forth the number of orders taken, men- " tioning particularly the styles of binding in which the " work has been ordered by subscribers.

" That the discounts provided for in said agreement " shall, from and after the first day of May, 1877, be as " follows, viz : Forty-five (45) per cent. from regular re- " tail price, on half morocco, half calf and full morocco ; " that is to say, half morocco, $3.85 ; half calf, $4.40, and " full morocco, $5.50 per copy net, subject, however, to

" any reduction that shall be hereafter made in retail " prices.

" The said agreement in all other respects to be and " to remain in full force and effect.

" Witness our hands and seals this first day of May, A. D. 1877.

" J. M. STODDART & CO.
" MOSES WARREN.

" In presence of—
" JOHN VANSANT.
" HENRY D. FIELD."

On the 10th day of March, 1877, the said Stoddart wrote to said Warren, as follows (*Printed Record, pp. 28, 29*) :

Moses Warren, Esq., 103 State street, Chicago, Ill.:

DEAR SIR : We this A. M. received your postal card of the 7th, and your telegram of the 9th. The telegram reads "express five each, volume one and five Britannica sheep." So we take it you wish ten volumes—5, 1 and 5, 5—and have to-day sent them, as per enclosed bill. The memorandum made when you were here is, Mr. Warren to send us assignment of contract with Carroll.

Check for	$333 33	
Note "	333 33 3	Months
" "	333 34 4	Months
	$1,000 00	

John Carroll's three notes are as follows :

$285 50, due June 4, 1877.
214 80, " August 4, 1877.
499 70, " September 8, 1877.

We trust the matter will be adjusted as soon as possible, as we are anxious to have the fifth volume delivered.

J. M. STODDART & CO.

B.

On the 24th of February, 1877, said Stoddart wrote to John Carroll, as follows (*Printed Record, p. 29*) :

PHILADELPHIA, February 24, 1877.

Mr. John Carroll, Chicago:

DEAR SIR : Having been informed by Mr. Moses Warren, of Chicago, that you desire to assign to him your contract with us, bearing date August 2, 1876, and to sell him all your right, title and interest in and under that

contract, provided we consent to such agreement, we take this method of informing you that we give our assent to such assignment, and release you from all obligations and liabilities thereunder to us, provided the sale and assignment by you to Mr. Warren is made for the full consideration you are willing to take for the same, and in full release by you to us of all our liabilities to you under said contract.

Yours very truly,
J. M. STODDART & CO.

On the 15th of March, 1877, said Stoddart wrote to Warren, as follows (*Printed Record, p. 29*):

Mr. Moses Warren, Chicago:

DEAR SIR: We are in receipt of yours of 13th inst., inclosing assigned contract of John Carroll; also, his old contract; thanks.

Also we find your check for $333.34, your note for $333.33, at three months from March 3, 1877, your note for $333.33, at four months from March 3, 1877, making $1,000.00.

In exchange for which, we send you herein, John Carroll's notes to our order, as follows:

One at one year from June 1, 1876, $285.50; one at one year from August 8, 1876, $214 80; one at one year from September 5, 1876, $499.70.

Which, by agreement, you will understand balances each other exactly.

We forward the orders for Encyclopedia, but in another envelope, with this package by express; also, duplicate contract with Carroll, canceled as required.

J. M. STODDART & CO.

Warren, the plaintiff in error, then offered in evidence the testimony of himself and others, tending to prove that he (Warren) entered upon the performance of said contract, and obtained up to April 20, 1878, 1,733 subscribers to said Encyclopedia, of twenty-one volumes each set, at a cost to him of procuring said subscriptions of over $25,000; and that he reported the same to Stoddart, in accordance with the terms of said contract; that he had taken nearly an average of four volumes on account of each set of said reprint of said Encyclopedia, consisting of twenty-one volumes each set, amounting to some six thousand volumes, and had paid for the same according to the terms of said contract; and that he had fully complied with all his agreements in said contract. (*Printed Record, p. 31.*)

It appears from said Stoddart's account, annexed to his declaration, that said Warren had paid to said Stoddart on account of the volumes delivered, being nearly an average of four volumes a set of said Encyclopedia, about $20,432.89, or nearly $3.50 per volume, on an average, which, at one-half the retail price fixed by the contract, would make the amount received by said Warren about $40,000 for said volumes. (*Prirted Record, p. 17.*)

It further appears from the bill of exceptions (*p. 31, printed Record*), that some time in May, 1878, the subscription edition of the Encyclopedia Britannica, published by Adam and Charles Black, Edinburgh, Scotland, from the original plates, was about to be introduced into the United States, of which the reprint of Stoddart's professed to be a copy; after which, about the 18th of May, 1878, said Warren notified said Stoddart & Co. that he thought it was not for his interest to canvass longer for the reprint edition; that he desired to fill all the orders taken for the reprint, but for new business he desired to canvass for the orignal work; whereupon Stoddart replied that he (Warren) could not ride two horses, and that if he accepted an agency for the original edition, he (Stoddart) would not supply him with the books to fill the orders already taken.

Nothing was then decided, but negotiations were continued until June 3, when said Warren accepted an agency of the rival or original work, *as to new business only*, and made a contract with Scribner & Co., of which the following is a copy, which copy was dated or antedated so as to read as follows:

"ARTICLES OF AGREEMENT, made and entered "into this 14th day of May, 1878, by and between Scrib- "ner & Armstrong, surviving partners of Scribner, Arm- "strong & Co., of the city and State of New York, par- "ties of the first part, and Moses Warren, of the city of

" Chicago, State of Illinois, party of the second part, wit-
" nesseth :

" That the said parties of the first part, being the sole
" purchasers and importers for the United States of the
" 'subscription edition of the *Encyclopedia Britannica*,
" published by Adam & Charles Black, Edinburgh, Scot-
" land, hereby agree to give said party of the second part
" the exclusive right to sell the above-named publication
" until completed, in the following territory, to wit: The
" States of Michigan, Wisconsin, Minnesota and Iowa;
" the counties of Pike, Scott, Morgan, Sangamon, Chris-
" tian, Shelby, Coles, Edgar, and all counties north of
" same in the State of Illinois; also, the counties of War-
" ren, Fountain, Montgomery, Boone, Hamilton, Madi-
" son, Delaware, Randolph, and all counties north of
" same in the State of Indiana.

" The said parties of the first part agree to furnish
" stock to fill all orders taken by said party of the second
" part, or by his agents, for said publication in said terri-
" tory, at the following prices, to-wit: Cloth binding,
" five dollars ($5) per volume; library leather binding,
" six dollars ($6) per volume; half calf binding, seven
" dollars (7) per volume, and half Russia binding, eight
" dollars ($8) per volume; less a uniform discount of for-
" ty-five (45) per cent. from above prices, subject to any
" reduction that may be hereafter made in retail prices,
" or of increased discounts to general agents; also, to fur-
" nish all specimen books, specimen pages and circulars,
" free of charge; boxing and cartage to be charged at
" actual cost price.

" The said party of the second part agrees to pay for
" all stock ordered by him in sixty days from date of in-
" voice and bills of lading.

" The said party of the second part further agrees:

" *First*. To use his best endeavors to promote the
" sale of said publication in his assigned field.

" *Second.* To make weekly reports of the number of " orders taken in the different styles for the week pre- " vious, to enable parties of the first part to keep sufficient " stock on hand to fill all orders promptly.

" *Third.* To confine his canvass for said publication " exclusively within the territory named herein.

" *Fourth.* To leave no volumes with booksellers to " sell or display in their stores.

" *Fifth.* To furnish no volumes to subscribers at " less than the regular retail prices.

" Said party of the second part further agrees not to " canvass, from and after this date, for the sale of any " encyclopedia other than the one named herein, to wit: " the subscription edition of the *Encyclopedia Britannica*, " published in Edinburgh, as aforesaid, but shall have the " privilege of completing orders already taken for the 're- " print edition,' published by J. M. Stoddart & Co., to all " subscribers therefor.

" Said parties of the first part agree to fill all orders " received from said party of the second part as fast as " stock is received from the Edinburgh publishers, and in " case this contract is terminated from any cause, said " parties of the first part hereby agree to supply stock to " complete all orders taken by said party of the second " part prior to the time of such termination, at the prices " and terms in force at that time.

" Witness our hands and seals, at the city of Chicago " and State of Illinois, the day and year above written.

SCRIBNER & ARMSTRONG, [Seal.]
Per S. L. HALL, *Att'y in fact.*
MOSES WARREN, [Seal.]

(*See Printed Record, p. 32.*)

Said Warren, having elected after the negotiations were ended, June 3, to accept the agency of the rival or original work as to new business only, the said Stoddart

refused to furnish said Warren with any books to fill the old orders or subscriptions, being the 1,733 subscriptions reported to said Stoddart by said Warren, except for the present, and then only on terms of cash accompanying the order.

The said Warren offered in evidence the following letter and order for books, which was forwarded from Chicago, June 1, 1878. The letter reads as follows:

CHICAGO, June 1, 1878.

Messrs. J. M. Stoddart & Co.:

Please forward to us the following: *Encyclopedia Britannica*, cloth, 1, 3; 2, 14; 3, 16; 5; 5, 8; 6, 13; 7, 6; sheep, 15, 50; 44, 44; 26, 31; 21; half turkey morocco, 4; 2, 2. Shipping directions, Star Union Line.

MOSES WARREN.

(Written across the face:) Duplicate original forwarded by mail on above date.

Which said Warren testified was duly sent, and that said figures meant the number of volumes wanted of each kind, and the number of the volumes wanted.

Also, a telegram of June 5th, as follows:

JUNE 5th, 1878.

J. M. Stoddart & Co., 723 Chestnut street, Philadelphia:

Have you filled my last order, or will it be filled immediately? Answer.

MOSES WARREN.

Which telegram was answered as follows:

PHILADELPHIA, June 7th, 1878.

We will supply you stock upon conditions written you to-day.

J. M. STODDART & CO.

And by letter of June 6, which letter was in the words following:

PHILADELPHIA, June 6th, 1878.

Moses Warren, Chicago:

DEAR SIR—You are indebted to us in the sum of $4,864.76, for part of which—the sum of $4,030.96—we hold your promissory notes. The two notes sent us by you May 25th, amounting to $650, in lieu of cash, are not so accepted. We must ask you to remit a draft covering these notes, and also covering the balance on book account and not included in the notes, amounting to $815.80, together $1,465.80. As to all future orders, for the present they will be filled when cash accompanies the orders.

J. M. STODDART & CO.

On the 7th day of June the following telegram was sent to Stoddart :

JUNE 7, 1878.

J. M. Stoddart & Co., 723 Chestnut street, Philadelphia :

Do you refuse to supply me stock to fill my orders for Encyclopedia reprint? If not answered immediately I shall understand that you do.

MOSES WARREN.

In reply to which telegram, Warren received the following :

Received at 128 Washington street. Dated :

PHILADELPHIA, Pa., June 7th, 1878.

To Moses Warren, 103 State street :

We will supply you stock upon conditions written you to-day.

J. M. STODDART & CO.

On the 10th of June the following telegram was sent :

JUNE 10th, 1878.

J. M. Stoddart & Co., 723 Chestnut street, Philadelphia :

I am desirous of delivering reprint fast as possible on my orders heretofore taken for same. If my orders for stock are filled, they shall be paid for according to contract. Do you intend to fill my orders on that basis? Answer.

MOSES WARREN.

On June 11th the following telegram was received by Warren :

128 Washington Street, June 11th, 1878.

Dated, Philadelphia, Pa.

To Moses Warren, 103 State street :

Will fill order when cash is received, in accordance with our letter of June 6th.

J. M. STODDART & CO.

Also the following telegram of June 19th, 1878, to which there was no reply :

JUNE 19, 1878.

J. M. Stoddart & Co., 723 Chestnut street, Philadelphia :

I desire to notify you that, in consequence of your refusal to perform your contract with me, I shall hold you responsible for any and all damages that I may sustain.

(31, paid, half rate.)

MOSES WARREN.

Said Warren, plaintiff in error, offered evidence tending to show that the said Encyclopedia reprint edition consisted of twenty-one volumes to each set when

completed; that the same could not be purchased in the markets, and that this fact was known to both parties; that said Warren could not purchase any substitute therefor, except the Scribner edition, otherwise known as the Hall book, and so designated on the trial; that the profits on four hundred orders based upon the difference between the contract price and the price to his subscribers, less the cost of delivery, which, on that basis, amounted to $20,073.80; and offered evidence tending to show the damage on 1,253 sets of the Encyclopedia to be only $12,206.45, in consequence of said Warren's reducing the damages by exchanging the original works for said reprint works subscribed for; and evidence tending to show that the damages sustained by him amounted to $32,280.25, less the amount of the plaintiff's account, amounting to $2,976.15, and tending to show that the balance due him by reason thereof amounted to $29,304.10. (*See Printed Record, p. 35.*)

Said plaintiff also introduced in evidence an agreement made by him with Charles Scribner's Sons, on the 20th of January, 1879, about eighth months after said Warren declined to procure further subscriptions under his contract with said Stoddart, which articles of agreement said Warren claimed were entered into for the purpose of reducing the damage which said Warren would otherwise sustain, as counsel claimed it was his duty to do, which said articles of agreement were in the following words:

"ARTICLES OF AGREEMENT made and entered into
"this 20th day of January, A. D. 1879, by and between
"Charles Scribner's Sons, of the city of New York, and
"State of New York, and Moses Warren, of the city of
"Chicago, and State of Illinois, witnesseth:

"That in the ordinary course of business in selling
"*Encyclopedia Britannica*, Edinburgh subscription edi-
"tion, the said Warren becomes possessed of volumes of

" what is termed the 'American reprint' of said *Encyclo-*
" *pedia Britannica*, for which latter volume the said Scrib-
" ners to purchase of the said Warren at the following
" rates, delivered in said city of Chicago, viz: Cloth
" bound volumes, at $1.75 each; library leather bound
" volumes, at $2.10 each; half-morocco bound volumes, at
" $2.20 each; half-calf bound volumes, at $2.30 each,
" and $1.75 for every ten parts or numbers of said Amer-
" ican reprint.

" CHARLES SCRIBNER'S SONS,
" *Per* S. L. HALL.
" MOSES WARREN."

Said Warren having been sued by Stoddart for a portion of the stock and books delivered to him under said contract of February 24, 1877, and the supplement thereto, claimed that there having been a breach of said contract by said Stoddart & Co., in refusing to deliver to him the Encyclopedia, so far as he had procured subscribers therefor and reported the same to the said Stoddart, and so far as he had taken several volumes of the set, he claimed that said Stoddart was bound to deliver to him the remaining volumes for each set which had been subscribed for and reported to the said Stoddart, upon said Warren's compliance with the terms of the contract, namely, by paying for the same on the 7th and 20th of the succeeding month for goods delivered the prior month. Said Warren claimed the right to set off his damages arising out of and under the contract sued upon by the plaintiff, the same being substantially a cross-action for the damages sustained by him.

Three suits were instituted by Stoddart upon notes given for the said books, and upon an open account for goods delivered under said contract, which three suits were, by agreement of the parties, consolidated and tried as one suit, and the defense made by said defendant,

going to each and all of said causes, according to the stipulation on file (*p. 25 printed Record*).

Upon the foregoing facts the court instructed the jury that Warren could not recover ; that the contract being in writing, its construction was for the court, and that as there was no dispute about the facts in the case, the court instructed the jury, as a matter of law, that Warren had no cause of action ; that the damages which Warren claimed could not be recovered by him ; that Warren was bound to continue in the service of Stoddart, and that, if he left that service without Stoddart's consent, Stoddart would be absolved from his contract to supply Warren any more volumes under the contract ; that, in such case, Stoddart had a right to exact cash from Warren on his orders, and was not bound to give him the credit agreed for in the contract.

To all of which rulings, severally, said Warren then and there duly excepted ; which charge of the court, and the exceptions thereto, appear of record and are contained in the printed record, commencing on page 35 and ending on page 48 of said printed record.

UPON THE FOREGOING FACTS, THE PLAINTIFF IN ERROR CLAIMS THAT THE COURT BELOW ERRED IN ITS RULINGS.

We have deemed it prudent to state all the facts bearing upon the contract in this case, so that whatever view may be taken of the contract under which we claim, the court here can understand fully the rights of the parties under it ; and the court can also direct as to the true rule or measure of damages.

The errors assigned in this case are found upon pages 50 and 51 of the printed record, and are based wholly upon the errors of the judge in charging and instructing the jury. The whole case turns upon the instructions of the judge. If his instructions were correct upon the fore-

going facts and upon his construction of the contract between the parties, the judgment below ought to be affirmed; if they are not correct, then the judgment should be reversed.

As was said by Judge Blodgett, and as we concede, the question turns upon the construction to be given to the contract of February 24, 1877, and found on pages 19 and 20 of the printed record. The contract being in writing, its construction is for the court. Perhaps, if there exists any doubt about its construction, the court may look at the letters which passed between the parties leading to the contract, as the contract was made through correspondence by letter; or, at all events, there was no communication between the parties, except by the letters.

In the case of *Railroad Co.* v. *Trimble*, 10 Wallace (U. S.) 367, this court said: "Where there is doubt as to the proper meaning of an instrument, the *construction* which the parties to it have themselves put upon it, is entitled to great consideration." *A fortiori*, what the party said would be the effect of the contract, at the time of making it, to the other party, who accepted it upon such statement—there being nothing in the contract itself to show that such would not be its effect, and where the contract, by a reasonable construction, would have such effect.

Vide, also, 5 Otto (U. S.) Rep., p. 31, *Reed* v. *Insurance Company*, and cases cited.

That the circumstances will be considered.—15 Wall. (U. S.) Rep. 94, *Canal Co.* v. *Hill*; and, also, *Nash* v. *Towne*, 5 Wallace, 689.

See the letters of January 30, 1877, of Stoddart to Warren, on page 27 of the printed record, and the letters of subsequent dates immediately following

Now, as this whole case depends upon the construction to be given to the contract, it will be proper for us to consider the different constructions which, it may be

claimed, can be placed upon this contract; or rather, the only constructions which can be given thereto.

This contract must be treated either as a contract between principal and agent; or, secondly, as an ordinary contract between vendor and vendee; or, thirdly, as a contract of a dual character—a portion of the business to be done in the nature of an agency, and a portion as of a contract between vendor and vendee.

The question first arising under this contract, in any view which may be taken of it, is, whether there was *a contract for a definite or limited time.*

Secondly, if there was not an express contract for the continuation of the relation of principal and agent for any definite time, will a contract be implied between the parties by the court, in the absence of any express agreement to serve for any particular time.

And finally, what would be the rights of the parties under such a contract, even if there were an agreement to serve for a particular time existing by express terms or by implication.

As to the first proposition, by referring to the contract, it will be found there is no express contract for any definite time. Let us examine this contract and analyze it.

The agreement of Stoddart is to furnish Warren books, not for any particular time, but to fill such subscriptions (which were for the entire work) as Warren might procure by canvassing in certain territory.

The only control over the territory that Stoddart retained was, in case Warren did not canvass satisfactorily, that Stoddart might take the the territory from him.

The agreement does not provide, in case of Warren's failing to canvass faithfully, that the contract shall be rescinded or *annulled entirely*. The parties, by their own contract, agreed what should be done, viz., that Stoddart might resume his territory.

Where the parties have provided what shall be done in case of default, the contract governs in that particular, as much as in any other matter within it.

The letter of January 30th states that a provision ought to be made in the contract for Stoddart's buying the orders, in case Warren did not go on with the contract, as the orders (subscriptions) would be Warren's property ; but there was a neglect to provide for this contingency.

Stoddart *was to furnish the Encyclopedia, to fill all orders which should be taken under the contract*, and also, by the letters, to fill all orders taken by Carroll, which had been purchased by Warren from Carroll. (These orders had been reported by Warren to Stoddart under the contract.)

So soon as Warren received and reported a subscriber to Stoddart, the contract in regard to procuring the subscriber was fully executed ; nothing remained but for Stoddart to comply with his part of the contract as vendor, to furnish the Encyclopedia of 21 vols., to Warren ; and nothing could excuse Stoddart from the duty imposed by his express agreement, except a failure to pay, by Warren, according to the terms of his agreement, or according to such other terms as may have been agreed to or accepted by Stoddart in lieu thereof.

It was foreseen by Stoddart, as appears by his letter of January 30, that Warren might not continue to canvass the territory. There was no claim that Warren could not discontinue the canvass, if he found it unprofitable, or at his will and pleasure. It was foreseen that Warren might not canvass to the satisfaction of Stoddart, and this case was provided for by the contract, viz., that Stoddart might resile or revoke the authority to canvass and claim his territory. It was not provided that he should have any other right, or that Stoddart should be released from the obligation to furnish the Encyclopedia to Warren, to supply or furnish him with copies of the Encyclopedia to

supply the subscribers which Warren had procured and reported to Stoddart, and as to which Warren had fully executed all that could in any view be considered as having been done by him as agent for Stoddart.

The balance of the agreement is a contract of bargain and sale, and the portion of the agreement relating to the furnishing of the work, and the manner in which the books are to be delivered and paid for, and at whose risk the property is to be, after delivery, and as to the expense of boxing, carting, etc., shows that the relation of bargainor and bargainee, or of vendor and vendee, was created between the parties.

The agency part of this contract, if any agency at all existed, related only to Warren being authorized to canvass in certain territory, and complying with certain regulations as to the mode of selling the goods of Stoddart.

He was to report to Stoddart, from week to week, the number of copies that he had obtained subscribers for, so that Stoddart might know whether Warren was canvassing the territory diligently and faithfully, or to his satisfaction.

If this agreement constituted an agency at all, then that agency related to the canvassing the territory faithfully, and the parties provided in the agreement for terminating the agency as a consequence of default.

This agreement as to the canvassing did not affect that part of Stoddart's agreement in relation to furnishing the Encyclopedia, to fill the orders or subscriptions taken by Warren in his own name, to fill the contracts made by him while acting under the so-called agency or contract to canvass.

That part of the contract is an agreement to furnish him with the Encyclopedia, to fill all orders taken by him.

The agreement is to furnish the work for every order taken and reported, whether the agency continued or not. The contract to furnish the work extended to every order taken and reported, and the right under the contract attached as fast as Warren procured subscribers and reported them. He had then done all that was required of him under the contract to entitle him to be furnished with the work, upon the terms of payment agreed upon. The contract of agency, if there was one, was then fully executed. It was reasonable in its character. Upon reporting the subscriptions to Stoddart, by the terms of the agreement Warren might then order the books so far as they had been published, and Stoddart was bound to furnish them by the terms of the agreement. An action could have been maintained for a refusal. Now, where a right of action has vested in a party, on account of his having partially performed a contract, such right of action would not be divested by a subsequent default, if there had been one.

Taylor v. *Laird*, 1 Hurlstone & Norman's Rep. 266.

Stubbs v. *The Hollywell Railway Company*, 2 Exchequer Law Reports 1867, p. 311.

2 Chitty on Contracts (11th Am. Ed.) p. 848; see notes.

Moore v. *Caruthers*, 17 B. Mon. 678.

Cunningham v. *Morrell*, 10 Johns. 203.

Bean v. *Atwater*, 4 Conn. 4.

McClure v. *Rush*, 6 Dana, 64.

White v. *Atkyns*, 8 Cush. (Mass.) 367.

Warren, under his agreement, was entitled to have the field to canvass until his authority was revoked, so far as he acted under the agreement, and procured subscriptions and reported them to Stoddart, he did all that he was to do as agent. He secured thereby his right

to have the agreement to sell to him the Encyclopedia carried out by Stoddart, whether he continued to canvass or not, as to all orders taken and reported. Warren had the right to have the Encyclopedia delivered to him to fill the orders taken and reported to Stoddart. It is clear, from Stoddart's letter of January 30, that *he* understood the contract that way, and it is believed that this is the true construction of the contract.

So far as this agreement constitutes an agency, so far either the principal or agent could terminate it at pleasure, except so far as it was made irrevocable, or so far as it was coupled with an interest; and saving the right of the agent to have a partially executed contract made by the agent carried out; or so far as it might be necessary to protect the rights of the agent for any act done under the contract, before revocation or renunciation of the agency.

Story on Agency, §§ 463, 465, 466 and 468.

Warren undertook all the expense of putting this new work before the public, costing him some $20,000 per annum, and it is incredible that a business man would have entered upon such an enterprise if Stoddart could terminate this agreement at will, or for cause, and thereby Warren would lose all his subscribers and years of labor.

The parties themselves did not so understand the contract, and the law does not so interpret it.

It cannot be pretended that there has been any violation by Warren of any express term of any part of the contract. There is no express term in the contract, from beginning to end, that Warren should continue to act or canvass for any particular length of time. As regards an express contract, there is a complete absence of anything of that kind.

It is certain, that if there was no contract on the part of Warren to continue to canvass for any particular time, then there could be nothing in the pretended claim

of Stoddart, that Warren was bound to continue to canvass, or lose all his rights under the contract. Therefore, it is necessary for Stoddart to claim that there was an *implied contract*, under which Warren was bound to continue to canvass for new subscribers, and that by refusing to go on and procure new subscribers he thus forfeited all his rights, which had previously vested in him, as well to the executed portions as to the unexecuted parts of the contract.

Let us look at the whole contract, and discern, if we can, whether there is any such implied contract as is claimed.

The general terms of the contract are, that Warren is appointed agent or canvasser while he continues to work the territory faithfully. This would seem to bind Stoddart as to the time in an ordinary contract; but the law seems to be, that if this was an agency, Stoddart could terminate it at any time, notwithstanding the provision that it should continue while Warren acted faithfully.

Vide Story on Agency, §§ *463, 466.*
Butler v. *Smith et al.*, 35 Miss. 459.

That is, he could terminate the agency so far as it was unexecuted. But the parties did not leave the matter to the law; they provided, in express terms, that Stoddart might take the territory from Warren in case he did not work the territory to the satisfaction of Stoddart.

We are, therefore, informed that although Warren was entitled to the territory while he worked it satisfactorily, yet Stoddart, if dissatisfied, could terminate the agency as to new business, or the getting of new subscriptions, at any time that he was dissatisfied. But this agreement does not, in any way, provide that Stoddart should be entitled to the property in the subscriptions already taken; nor does it provide that Warren shall surrender them for any sum, or in any way lose his prop-

erty in them. Nor does it provide that Stoddart shall not be obliged to furnish the Encyclopedia to Warren, on the subscriptions already obtained and reported to Stoddart, or, in other words, that Warren shall not have the benefit of the contract as to the executed part, on the part of Warren, for it will be remembered that Warren had fully executed his part of the contract of agency when he had obtained the subscriptions and reported the same to Stoddart, before any termination of the agency by either party. As to these, Warren had done all he agreed to do to entitle him to have the Encyclopedia furnished him at the price, at the time, and on the terms agreed upon between the parties.

The agency part was executed as to the subscriptions obtained and reported to Stoddart.

It will be noticed that while Stoddart agreed to give Warren the territory so long as he faithfully worked the same, it was subject to his (Stoddart's) right to terminate the agency to get new subscribers, if he was not satisfied with Warren.

Warren did not agree to canvass the same for any length of time whatever. He did agree to canvass it faithfully while he occupied the field, but did not agree to canvass it while the book was being published, nor during his lifetime, nor for any other period whatever. Nor can the law imply such an agreement from anything in the contract, and if we look outside of the contract we will see that Stoddart did not so understand it.

Then there are two engagements in this contract: One upon the side of Stoddart, and the other upon the side of Warren, and they are the only two express agreements to be found in the contract. With regard to Warren, the express engagement on his part is, that he will faithfully canvass the territory; that he will comply with the rules of the house in regard to not selling outside of his territory, and that he will report each week the number of his

subscriptions, but he does not agree to do this for any length of time whatever.

That is all Warren actually and openly contracts for. He does not bind himself to go on for any length of time, because it might not be profitable nor to his interest to go on.

Stoddart is content with this, because if Warren does not go on to his satisfaction, Stoddart reserves the right to terminate the agency as to future business, and can then employ other agents in the same manner as he did Warren in the place of Carroll. Warren would retain his rights to have the contract fulfilled, so far as he had complied with it and procured the subscribers, in the same manner that Carroll's contract was to be fulfilled. The orders for the books, in the language of Stoddart, in his letter of January 30th, were (" your ") Warren's property. Both of the parties so understood it.

And that letter further says, just what we think the law implies in this case: That in case Warren should not continue to procure new subscribers, the orders already or then obtained would be Warren's property, and for that reason Stoddart thought the purchase thereof should be provided for in the agreement. See letter of Junuary 30, 1877. (*Printed Record, p. 27.*)

It occurred to the parties at that time, What if the agency to procure new subscriptions does not continue? What if Warren does not go on with the agency, to procure new subscribers? Stoddart says, letter of January 30, 1877, in this case some arrangement ought to be made about such contingency, as to those orders which he might take under the contract. " *Those contracts with subscribers already taken will belong to you.*" Now Mr. Stoddart's counsel claims, that although there was no express contract that Warren should continue to canvass any length of time whatever, there was an implied con-

tract that he should canvass during the time the work was being published.

These parties were both experienced in their business, both had been engaged in this line of business for many years, they discussed the matter in controversy, and knew the point now in dispute might arise, and Stoddart stated in his letter to Warren, that his rights would be just what we now claim they are, in case he (Warren) did not continue to canvass for new subscribers after he had gone on under the contract for canvassing.

These parties, then, with the very point in controversy before their minds, made this agreement now before the court in this record.

That contract covers the protection which the parties have provided for themselves, with reference to the duration of the so-called agency, with reference to the continuance of the agreements.

As the parties have provided this kind of protection for themselves, upon what principle is the court to introduce into, and to imply into the agreement, something that is not found there, not expressed, viz., an engagement on the part of Warren that he will continue to canvass for new subscribers, while the work is being published, or during his life, or for any other time whatever.

If there had been an intention of that kind, that there should be an implied agreement of that kind, how inconsistent with Stoddart's views, as contained in his letter to Warren, of January 30 preceding.

The contract was made by correspondence of the parties. They did not meet personally, and those letters, if not a part of the contract, certainly show that no such implication as is now claimed can be drawn from the contract in evidence.

Stoddart took no risk by the contract, interpreted as we claim it should be, because as long as Warren occupied the territory assigned him, Stoddart would sell to

Warren the work for all Warren's subscribers. When he ceased to canvass to Stoddart's satisfaction, Stoddart could resume the territory, and himself or his new agents could occupy the field. This was protection enough to Stoddart. He got the benefit of Warren's labors and canvassing while he occupied the territory, and if Warren failed to work it satisfactorily to Stoddart, he reserved the right to take the territory from him. It was not considered necessary or advisable that Warren should lose the benefit of the work already done.

It was to their mutual benefit that Warren should go on and fill the orders which he should take during the time he occupied the territory.

The parties had this in view, and made their contract so as to provide for the contingency which has happened. There can be no propriety in the court's undertaking to supply by implication an agreement to continue to canvass the territory, when it appears that the subject was considered by the parties, and they have made an express contract, covering the case with such protection as they deemed sufficient.

The most that can be claimed under the contract is, that Warren agreed to canvass diligently.

Suppose he did not, what then? The parties agreed, that Stoddart might take the field for canvassing away from him. Not that Warren should lose all his property in the contracts taken from subscribers, or his contract with Stoddart to furnish the Encyclopedia to subscribers already taken on the faith of Stoddart's agreement to furnish the work *to fill all orders taken.* Now, suppose Warren did not canvass faithfully, or did not canvass at all. What was the penalty? The parties agreed upon this, viz., that Stoddart might resume his territory and put another agent in his place. This was the agreement of the parties as expressed, and the court is asked to imply

a different agreement—one that Warren never could have consented to.

The simple point now appears to be, that as Warren did not agree to canvass for any specified time, that he has not violated any *express* terms of the contract. Can the court say that there is any *implied contract* which Warren has violated? The question to be determined is, whether the contract upon which the action is brought involves an *implied agreement on the part of Warren* that he will *continue to canvass* the territory given him for any *specified time*, and whether he has so violated such implied agreement as to forfeit all his rights under the contract sued on.

The publication of this book was to run through seven years. The parties have not agreed that this agency shall continue seven years; Warren has not agreed to act for seven years, nor during the publication or reprinting of the work.

It would be a singular undertaking to *introduce by implication* into an agreement a claim that Warren would never, during *a period of seven years*, or while that reprint was being published, discontinue the canvass of that wide territory, and disable himself from attending to other business during that long period of time.

Warren did agree, that if he did not faithfully canvass, Stoddart might recall his authority to canvass; both parties agreed to this, and there being an express provision as to this matter, there is no ground for *implying* that he agreed to continue absolutely to canvass during the publication.

It would be more reasonable to imply that Warren would not agree to bind himself for seven years to continue to canvass when it might be unprofitable or ruinous to him to do so.

If anything was implied, it might be that Warren would not bind himself to canvass for any definite time,

but would agree that Stoddart might resume his territory, if Warren did not canvass to his satisfaction. Upon the subject of implying contracts, it was said by the Lord Chief Justice, in *Stirling* v. *Maitland*, 5 Best & Smith, 840, on page 852 :

" If you find that a certain state of things, which " existed at the date of the contract, is necessary, in order " to give the contract any effect at all, you may, no doubt, acting with due care and caution, in such cases imply an " agreement that that state of things shall exist, because " otherwise no effect could be given to the contract." But in our case, full effect could be given to the contract in the way we claim it ought to be interpreted, and exactly the effect that Stoddart said in his letter to Warren, of January 30, should be given to the matter.

It surely cannot be implied upon an agreement in writing, unless there is some special term in the contract, that a party to the contract should continue to carry on a business, whether the business is a profitable one or not ; and whether for his own sake or for his own benefit, he wishes to carry it on or not, merely because the other party would be benefited by continuing to carry on the business.

In a contract of this kind there must be some express or special obligation to continue the business, otherwise the party must certainly be at liberty to discontinue and put an end to any business that he has not specially covenanted to continue for a specified time. It would be unprecedented for the court to imply a covenant to continue a business that was unprofitable for the party to carry on, merely because it would be of benefit to the other party.

A very learned and instructive case upon the subject of *implying* agreements, where the parties themselves have reduced their own agreements to writing, may be found in English Reports, Moak's Notes, vol. 15, p. 130, *Rhodes*

v. *Forward*. See, also, the cases of *Coffin* v. *Landis*, 10 Wright's (Pa.) Rep. 426, and *Peacock* v. *Cummings et al.*, 46 Pa. St. Rep. 434.

We think we have shown clearly, that the contract set up in this case does not expressly require Warren to continue to canvass for any definite time, and we have also clearly shown, by the authorities, that where the parties at the time of making the contract had the subject matter in defense before them, and did not provide for the contingency that had occurred to them as a matter or a subject that ought to be provided for in the contract, and they neglected or failed to make provision for the contingency which they foresaw might arise, in such case the courts will not imply any agreement for the parties, or for either party; unless such implication arises necessarily, and that without such implication the contract could have no force or effect at all.

If the contract can be construed so as to give it any effect at all, or so that it will not defeat and annul the general purpose for which it was entered into, then, and in such case, the court will not imply an agreement in favor of either party.

We think the whole current of authorities in England and in this country, will be found to support this view of the law, as to implying an agreement in a written contract.

It being considered the only safe doctrine, to leave the parties to the contract as made by themselves, except in the case where the contract would be wholly inoperative unless the court implied some agreement, which, from the circumstances, it is plain the parties mutually intended should exist, and without which the contract would otherwise be wholly inoperative for the general objects for which it was entered into, the court, under the circumstances, using due care and caution, will treat as an implied agreement that which is necessary to preserve the inten-

tion of the parties, which must, from the character of the contract, clearly appear to have been intended.

Now, as there is no express agreement that Warren will continue to canvass for any given or fixed time, and as it is believed that the court can not and will not imply an agreement for the parties in this case, there can be no question regarding a condition precedent to be performed by Warren, if the contract is treated as an ordinary contract of bargainor and bargainee—the covenants not existing. There can be no pretense for, or of a failure to, perform a *precedent* condition, as none existed.

In like manner, if the relation of principal and agent was created by the contract—unless it was created for a specific time—either party had the right to terminate the agency, as to all unexecuted or future business of the agency. But the *principal* would have no right to terminate the agency as to so much of the business of the agency as had been partially executed. In such case, if the law of principal and agent is to be applied, Warren's rights will be found to be exactly what we claim them to be.

The rule in such case, as laid down by Judge STORY, in his treatise on Agency, is as follows :

" But let us suppose that the authority has been *in part* " actually executed by the agent ; in that case, the question " will arise, whether the principal can revoke the authority, " either in whole or as to the part which remains unexe- " cuted. The true principle would seem to be, that if the " authority admits of severance, or of being revoked as to " the part which is unexecuted, either as to the agent or as " to third persons, then, and in such case, the revocation " will be good as to the part unexecuted, but not as to the " part already executed. But if the authority be not thus " severable, and damage will thereby happen to the " agent on account of the execution of the authority *pro* " *tanto*, there the principal will not be allowed to revoke

" the unexecuted part, or at least not without fully indem-
" nifying the agent."

Story on Agency, §§ *463–466*.

The same rule will be found to prevail in all the cases and in all the treatises on agency. See

Dunlap's Paley on Agency, *pp. 183, 184, and notes.*

U. S. v. *Jarvis*, Daveis's D. C. Rep. 274.

Butler v. *Smith et al.*, 35 Miss. Rep. 459.

As to all *new business*, either principal or agent could terminate the agency at the pleasure of the party; as to all business of the agency which had been partially executed, the principal could not terminate the agency without indemnifying the agent, if there had been an agency as to the sale of the books to Warren.

Story on Agency, § *466*.

Now Warren never proposed to terminate the entire contract between himself and Stoddart. He only proposed to fill and perform the contract so far as the parties had acted under it, but as to future or new business he did not propose to act further under the contract. And if the agent was not bound to continue in the service of his principal, Warren did only what he had a perfect right to do.

He owed no allegiance to Stoddart, other than the allegiance called for by the contract. He was bound to serve, or canvass faithfully, while he did canvass. But he was not bound to canvass longer than his interests would be promoted by it, or longer than he thought best. He did not forfeit all his rights by failing to do what Stoddart required him to do, but what he had not agreed to do.

If counsel are correct in their view of this case, then the court below was clearly wrong in its construction of the contract in controversy.

But it is believed, that if there had been an express contract in this case, that Warren should continue to canvass during the entire publication of the work, that it would not have constituted a condition precedent so as to defeat Warren's right of action under it. The agreement, if it had been made, might have constituted a defense *pro tanto*, or for such damages as Stoddart might have sustained for the breach of it; but it in no sense constituted a condition precedent. So soon as Warren obtained a single subscriber under that contract, and reported that subscriber to Stoddart, he (Warren) had done all that he was required to do to entitle him to order the entire work to fill that particular subscription, as fast as it might be published. He could order the first volume immediately, and every succeeding volume as it was published; and, in case Stoddart refused to deliver such volume, Warren could have immediately sued Stoddart for a breach of the contract.

Taylor v. *Laird*, 1 Hurl. & Nor. 266.

Stubbs v. *Hollywell Railway Company*, 2 Exchequ. Law Reports 1867, p. 311, and cases cited *ante*.

Phila. R. R. Co. v. *Howard*, 13 How. (U. S.) 308.

A right of action vested in Warren immediately in such case, and having vested, it could not be divested by a subsequent act or default on the part of Warren. If Warren was guilty of a subsequent breach of the contract, that could be used as a defense in mitigating the damages, or as a set-off to Warren's claim, but it could not make that a condition precedent, which was not to be performed by Warren until after the right of action was vested in Warren. Such a case, in principle, is the same as if Warren had agreed to serve Stoddart seven years,

to be paid every month, at the rate of one hundred dollars per month, to be paid at the end of each and every month.

Warren, having served one year, quits the service and sues for one year's pay. The service for seven years in such case, is not a condition precedent.

Warren can maintain an action for so much as he was to receive by the terms of the contract, prior to his default, subject to the right of Stoddart to recoup or set off such damages as he may have sustained by the breach of the contract to serve the seven years; notwithstanding Warren may have quit the service before commencing the action for his wages.

So when he acquired the right to the work by obtaining the subscriber, and reporting the same to Stoddart, he had a vested right to the work on paying for same according to contract. He had done all that the contract required him to do, and was entitled to his right of action on default of Stoddart. A right of action vested in Warren immediately, and was not divested by a subsequent default, if there had been one.

This doctrine seems to be founded on the highest reason. If such contracts were treated as conditions precedent it would involve great hardship on one side, and would give benefits to the other party beyond the necessities of the case.

Suppose Warren had agreed to serve seven years, and had served six years and eleven months, and that he then died, he would have lost the benefit of his contract, if the service was treated as a condition precedent. Or suppose, as the canvassing had to be satisfactory to Stoddart, that at the end of six years he decided it unsatisfactory. If the service of seven years was a condition precedent, as Stoddart had a legal right to terminate it, if, in his judgment, Warren's canvassing did not meet his requirements. If this were treated as a condition prece-

dent, Warren would lose all his property in the subscriptions.

Tyler v. *Ames*, 6 Lansing (Superior Court Reports, N. Y.) 280.

And if the seven years' service was a condition precedent to Warren's right of recovery, Warren would lose all benefit under the contract.

So, if Warren should be unable to continue the canvass, for any cause, he would lose all benefit under the contract, if such subsequent service was held to be a condition precedent. Therefore, where a contract is divisible in its nature, or where the terms of the contract do not require that the matter be treated as a condition precedent, the court will be inclined to regard the covenant as not dependent, being the more equitable doctrine to treat such covenents as independent, and leave each party to his remedy for a breach of such covenant as may have been broken, and to secure such damages as he may have actually sustained.

But the authorities upon this point seem to be well settled and conclusive.

The case of *Phila. W. & B. R. R. Co.* v. *Howard*, 13 How (U. S.) Rep. 308, holds distinctly that "a covenant to finish the work by a certain day, on the one part, and a covenant to pay monthly on the other part, were distinct and independent covenants."

There are some points in the instructions of Judge BLODGETT so manifestly erroneous, we trust we may be pardoned for again referring to them.

1. The court instructed that this contract created the relation of principal and agent.

2. That therefore all subscriptions obtained by Warren were the property of Stoddart, the principal.

to be paid every month, at the rate of one hundred dollars per month, to be paid at the end of each and every month.

Warren, having served one year, quits the service and sues for one year's pay. The service for seven years in such case, is not a condition precedent.

Warren can maintain an action for so much as he was to receive by the terms of the contract, prior to his default, subject to the right of Stoddart to recoup or set off such damages as he may have sustained by the breach of the contract to serve the seven years; notwithstanding Warren may have quit the service before commencing the action for his wages.

So when he acquired the right to the work by obtaining the subscriber, and reporting the same to Stoddart, he had a vested right to the work on paying for same according to contract. He had done all that the contract required him to do, and was entitled to his right of action on default of Stoddart. A right of action vested in Warren immediately, and was not divested by a subsequent default, if there had been one.

This doctrine seems to be founded on the highest reason. If such contracts were treated as conditions precedent it would involve great hardship on one side, and would give benefits to the other party beyond the necessities of the case.

Suppose Warren had agreed to serve seven years, and had served six years and eleven months, and that he then died, he would have lost the benefit of his contract, if the service was treated as a condition precedent. Or suppose, as the canvassing had to be satisfactory to Stoddart, that at the end of six years he decided it unsatisfactory. If the service of seven years was a condition precedent, as Stoddart had a legal right to terminate it, if, in his judgment, Warren's canvassing did not meet his requirements. If this were treated as a condition prece-

dent, Warren would lose all his property in the subscriptions.

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There are some points in the instructions of Judge BLODGETT so manifestly erroneous, we trust we may be pardoned for again referring to them.

1. The court instructed that this contract created the relation of principal and agent.

2. That therefore all subscriptions obtained by Warren were the property of Stoddart, the principal.

3. That although Warren, the agent, had entered upon the business of the agency, and had partly executed such business by delivering four out of the twenty-one volumes, and had entered into contracts with third persons in his own name, to supply such persons with the entire work of twenty-one volumes; still, if the agent did not continue in the service of the principal, the principal would not be bound to carry out his agreement with the agent; nor was he bound to indemnify him.

4. The court held that it was the duty of the agent to turn over all his contracts of subscriptions, although made in his own name, and that the agent must trust to the principal to fill the contracts of subscription, or rely upon a court of equity to award him damages or compensation.

In reply to these instructions, which were duly excepted to, our answer is, to the first: That this was not a contract wholly of agency; it was a contract by Stoddart to *sell*, *supply*, to *furnish* Warren with so many copies of the *work* as he (Warren) might obtain subscribers for, under the contract, within the territory assigned to him to canvass, and which Warren should report to Stoddart. The business of canvassing may have been of the nature of an *agency*, but the agreement to furnish the volumes when *a subscriber* was otained and reported, was a contract of bargain and sale, and did not have an element of agency about it. Warren, when he ordered a *book*, could not return *it* (unless damaged). He was bound to pay for it—one half on the 7th, and the other half on the 20th of the succeeding month. On the delivery of the book under the order, the book became Warren's property; Warren became the debtor for it. The property passed to Warren; in case of fire, it would have been his loss, and in case of death or bankruptcy, it would have passed to Warren's legal representatives. Warren could sell it to whom he pleased, and on what

terms he pleased; the only limit was as to price, and that it should be to a subscriber. Stoddart could not control or prevent such sale. The relation of vendor and vendee existed as to the books ordered under the contract, and the relation of principal and agent did not exist at all (if it ever existed) after the subscription was procured, and after Warren had reported the same to Stoddart. At that period, whatever of agency existed, if any existed, was terminated, and from that time the contract provides for a sale to Warren, on his order, for the book or books to which he was entitled by the terms of the contract. By procuring the subscriber, and reporting such subscriber to Stoddart, he (Warren) had earned and was entitled to the right to have the books necessary to fill that subscription on *the credit* specified in the contract.

Vide 6 Chancery App. Cases, Law Rep. 737, *Ex parte Neville* v. *White*.

It is believed that the relation of principal and agent never existed between Stoddart and Warren, certainly not as construed by Judge Blodgett; that Warren owed no allegience of any name or character to Stoddart, except to abide by the terms of his contract made in writing; that the expectations of either party have nothing to do with the true interpretation of the contract; that the contract, being in writing and *express*, nothing can be taken by implication, except what would naturally and properly flow from the agreement itself.

That this was not an agency in fact, but only in name, is clearly shown by a reference to a late English case, *Ex parte Neville* v. *White*, 6 Chan. Ap. Cases, Law R. 737.

That case establishes that the property in the goods passed to Warren upon the delivery to him, he being the purchaser thereof and not entitled to return the same, except they were damaged; and being bound to pay for the same in the month succeeding the time of ordering

the same, the property in the books passed to him by the terms of the contract, upon being delivered on his order, and in case of his bankruptcy or insolvency, could not have been reclaimed by Stoddart any more than by any other creditor.

The right of Warren to sell these goods to whom he pleased, and on what terms he pleased, as to cash or credit, shows plainly that the goods were his ; that Stoddart had no control over them in any manner whatever. The relation of vendor and vendee existed in as full and ample a manner as in any contract of bargain and sale. The contract provides for a sale to Warren upon his ordering the goods, and provides the terms upon which he shall pay for them, the time of credit.

If the relation of vendor and vendee existed, Warren owed no more allegiance to Stoddart than to any other person; except so far as such allegiance was called for by the terms of the contract with Stoddart, he was bound to do precisely what he agreed to do, and nothing more.

The agreement, on the part of Stoddart, was, that he would supply Warren with the Encyclopedia at certain fixed prices ; that is, not the first volumes, but the whole work. He reserved the right, in case Warren did not canvass the territory to his satisfaction, to revoke the so-called agency for future canvassing. He did not reserve the right to annul the whole agreement. His letter of January 30th, 1877, shows that he understood that Warren would own these subscriptions (these orders), and be entitled to fill them, and Stoddart expressly agrees to furnish Warren the books with which to fill them on terms specified. Stoddart refused to comply with this contract, and for such refusal Warren is entitled to damages. It was contemplated by both parties that Warren would procure subscriptions for that work, and not for certain volumes of it,—the work as a whole; and this was contemplated from the time he commenced to canvass.

It was perfectly understood that Warren would necessarily agree with third persons to furnish them with the entire work, and that such subscribers would agree to take, as they did, the entire publication from Warren. Warren incurred a personal liability to each subscriber for that work, and had to purchase from Stoddart and deliver to those subscribers every volume as it was published. Stoddart agreed to supply Warren with the entire work, so far as Warren procured the orders, subject only to one condition: that Warren should pay on the 7th and 20th of each succeeding month for the volumes ordered and delivered to him the preceding month.

There is no limitation or qualification of this agreement by Stoddart to supply the reprint of the *American Encyclopedia* in twenty-one volumes. He agrees to do this absolutely, and at all events, save that if Warren failed to pay according to the terms of the agreement, Stoddart might, if a sufficient default occurred to justify, refuse to credit Warren for them.

Warren proceeded and acted under the contract, and complied with the terms until May, 1877. At this time, Warren, in consequence of the appearance of the original Edinburgh edition in this country, to be published and furnished at the same price, came to the conclusion that he could not afford to continue to canvass for the reprint edition. His expenses had been nearly $20,000 a year for canvassing, and with the original edition to be furnished at substantially the same price, he did not feel justified in continuing to canvass for the reprint edition, and at once notified Stoddart that he wished to surrender the territory to him, so far as new business was concerned; that for the old business, or for subscribers already obtained, to whom he had delivered from three to four volumes each, he wished to carry out his contract. That during the time he occupied the territory he canvassed it faithfully and vigorously, and had procured nearly two

thousand subscribers, and was anxious and willing to give him (Stoddart) the benefit of all the work that had been done in the territory up to that time, and to carry out his contract precisely as made up to that time, and to pay for the books according to the terms of the contract; but that he was unwilling to continue the canvass of that territory longer, and therefore proposed not to take any further subscriptions under the contract, but to close out what had been done, and to surrender the territory to Stoddart, that he might procure other agents to work it for him.

If, by this refusal, Warren forfeited all rights under the contract, all rights to have the books furnished to the subscribers to fill the orders, and to supply the remaining volumes to make up the sets upon which he had already paid Stoddart more than $20,000, then the instructions of the court below were right. If he did not forfeit all his rights in this contract by refusing to go on and procure new subscribers during the pleasure of Stoddart, or during the publication of the work, then it is believed the instructions of the court were wrong, and the case must be reversed.

Our reply to the second point is, that the property in the contracts which Warren made with his subscribers were not the property of Stoddart at all. It may be conceded as a general rule, that the contract of the agent with third persons is the contract of the principal; but that rule cannot apply in this case, because the contract itself expressly provides that Stoddart will furnish the work to *Warren*, and *will sell* the work to Warren on a *credit* to him, and that *he* (*Warren*) *shall pay* for the work *to Stoddart*. All that Warren has to do under the contract to entitle himself to have the books at the price agreed upon is, that he shall procure subscribers and report them to Stoddart. Stoddart would be entitled to only about one-half of the subscription price by the

terms of the contract. The whole of the subscription price from the subscriber belonged to Warren; he had a right to exact all cash for it, and he had a right to have a credit for the price which he was to pay Stoddart. We have before shown that Stoddart, in his letter of January 30, 1877, stated to Warren that such would be the case.

The contract which Warren made with his subscribers was made in his own name, and on his own account. A copy of the blanks given to his canvassers may be found in the printed record, page 23, in the following words:

OFFICE OF MOSES WARREN,
GENERAL AGENT FOR SUBSCRIPTION BOOKS,
103 STATE STREET, CHICAGO, ———, 187 .

The undersigned promises to deliver, in good order, the *Encyclopedia Britannica*, American reprint, ninth edition, in 21 vols. (as published), not oftener than one vol. every four months, to ——— ———, of ———————, in ———————— binding, at $——— per vol., payable on delivery of each vol.

(Signed) MOSES WARREN, *Gen'l Agt.*
By ———————, *Canvasser.*

This contract was executed by Warren with every one of his subscribers, and although he describes himself therein as general agent, he does not say of, or for, any person. Stoddart's name is not referred to in the contract at all. The contract is with Moses Warren, and the term general agent is a mere *descriptio personæ*, and might as well have been Moses Warren, bookseller, by ————, canvasser; in fact, it was merely descriptive of the business in which Moses Warren was then, and for many years prior thereto had been, engaged. There is nothing, then, in the form of Warren's contract with his subscribers to confer upon Stoddart any right whatever, other than his right secured to him by his contract with Warren of February 24, 1877.

Warren's contract with his subscribers was made in his own name and for his own benefit. It is just the case put by Judge STORY, of an agent making contracts in his own name—if this could be regarded entirely and com-

pletely as a contract of agency. But we have seen, by the case of *Ex parte Neville* v. *White*, 6 Chan. App. Cases, Law Rep. 737, that the relation of bargainor and bargainee, or vendor and vendee, existed between Warren and his subscribers; and that money due from them was due to him; and that only about 50 to 60 per cent. of the subscription price would have to be paid to Stoddart—and even that portion was a debt from Warren to Stoddart, for which Stoddart gave Warren a credit until the 7th and 20th of the succeeding month.

Stoddart had no more claims upon Warren's subscribers than any other creditor has upon his debtor's debtor.

Our position is, that the contract of February 24, 1877, created the relation of vendor and vendee, or bargainor and bargainee; although districts of territory were assigned to Warren, and this was called an agency, in which he (Warren) might canvass for subscribers, if he obtained such subscribers within that district and reported the same to Stoddart.

He thereby entitled himself to purchase entire copies of the work for such subscribers, on the terms specified in the contract, and Stoddart was bound by the terms of the contract to supply to Warren the necessary volumes to fill his orders, on the terms of credit agreed upon. The mere calling of this an agency, did not make it one; or the calling of one a canvasser, or one who employed canvassers, upon the terms of this contract, did not make such canvasser or person an agent in the sense in which that term is used in the law. It would be merely a misnomer of the legal effect of the contract. But if the contract had created the relation of principal and agent, that relation continued, by the terms of the contract itself,

only so long as Stoddart, the principal, retained the sole control over his property and over the disposition of it.

Vide Moak's Notes to English Reports, vol. 15, p. 136.

6 Ch. App. Cases, Law Reports, p. 737.

The moment Warren obtained a subscriber and reported that subscriber to Stoddart, all control over the matter by Stoddart was ended by the terms of the contract itself. Warren had nothing to do but to order the books, as they were published from time to time, to fill these subscriptions, and it immediately then became the duty of Stoddart to fill the orders and give Warren the credit provided for in the contract. By the terms of the contract Warren was to become a vendee of the books ordered, and not the agent for Stoddart at all.

The moment Stoddart shipped to Warren, under the contract, a single volume, that moment Warren became the owner of the book, not an agent at all. He could not even return it, by the express provision of the contract, unless it was damaged. The contract, by its own terms, provided for and created the relation of vendor and vendee.

Vide 6 Chancery Appeal Cases, Law Reports, p. 397.

Ex parte White, in re Neville, 3 Duer's (N. Y.) Superior Court Reports, p. 338.

Depew v. *Keyser*.

To the third point our reply is, that if the contract in controversy had created the relation of principal and agent, and even if an agency had existed, the court below was wrong in holding that the entire contract became void or was wholly terminated, or that it could be terminated by the principal without the consent of the agent, and without indemnity to the agent because it had been

partially executed, and the agent would be damaged by such revocation. Warren claims that the executed part of the contract, and the partially executed part thereof, could not be revoked by Stoddart. That only the executory part which related to the obtaining *new subscribers* could be terminated by the action of either party. The rule in such cases is, " That where the agency has been in " part executed by the agent, if the authority admits of " severance, or of being revoked as to the part which is " unexecuted, either as to the agent or as to third persons, " the revocation will be good as to the part unexecuted, " but not as to the part already executed. "

Vide Story on Agency, §466.

" If the authority be not severable, and damage will " thereby happen to the agent on account of the execution " *pro tanto*, there the principal will not be allowed to re- " voke the unexecuted part, at least without compensation " and full indemnity to the agent. "

Story on Agency, §466.

In this case, on the faith of the contract, Warren had entered into a personal liability and personal contract with each of his subscribers to *furnish* the entire twenty-one volumes of the work. And had already purchased of Stoddart four volumes, and had delivered the same to his subscribers, and was liable personally to furnish the other seventeen volumes. So that Warren was clearly within the rule laid down by Judge Story.

Vide also Dunlap's Paley on Agency, p. 183 and p. 184, and Notes.

United States v. *Jarvis*, Daveis's D. C. Rep. p. 274.

Butler v. *Smith et al.*, 35 Mississippi Rep. 459.

So far as Warren had proceeded under this contract and obtained subscribers and reported them to Stoddart,

so far the contract had been executed by Warren, in all that was to be done on the part of Warren, save to pay for the books after they had been furnished by Stoddart, according to the terms of the contract; that is to say, on the 7th and 20th of the month succeeding the month they were furnished to Warren on his order.

It will be conceded that if the contract between Warren, the plaintiff in error, and Stoddart, the defendant in error, had specified *the time* during which Warren should canvass the district assigned him, there might be ground for claiming damages for a breach of such portion of the contract as he failed to perform. But there is nothing in the contract that fixes the time during which Warren agrees to canvass the district assigned to him, and therefore he was at liberty to discontinue the canvass at his pleasure. That an agent may terminate the relation of agent at any time, in the absence of an agreement for a specified time,

Vide Story on Agency, §§*463, 466.*

Dunlap's Paley's Agency, pp. 183 and 184, and Notes.

Butler v. *Smith et al.*, 35 Mississippi, 459.

United States v. *Jarvis*, Daveis's D. C. Rep. 274.

Where the parties to a contract have not fixed *a definite time* that the contract shall bind them, the court cannot fix a time for them. And the party not bound may terminate the relation at pleasure.

Coffin v. *Landis*, 46 Penn. St. Rep. 426.

Peacock et al. v. *Cummings*, 46 Penn. St. Rep. 434.

Orr v. *Ward*, 73 Ill. Rep. 318.

Ashelm v. *Austin*, 5 Queen's Bench Rep. 2 C. Law Rep. (B. & Ad.) 671.

Dunn v. *Sayles*, same volume, 685.

Butler v. *Smith et al.*, 35 Miss. 459.

Judge BLODGETT charged, on page 38 of printed record, as follows :

" Much stress has been laid in the argument upon *the* " *time* for which this contract was to continue in force, but " to my mind that is an immaterial question for the pur- " poses of this case. I do not think it is of any essential " importance whether this was a contract which continued " during the entire time this book was in the progress of " coming out, until the issue was completed, or whether it " was determinable at the will of either of the parties."

It would seem that this cannot be the case, for if Warren had a right to discontinue the *canvassing* as to new business ; if he had the right to cease to procure new subscribers at his pleasure, no damage or injury could legally flow from the exercise of such a legal right. No right of action could accrue to Stoddart if Warren did only what he had a right under his contract to do. No injury could legally result to Stoddart from Warren's exercising his legal rights. If Warren was not bound by law, nor by his contract, to continue to canvass for Stoddart, how can Stoddart complain that Warren did not do what he (Warren) was under no obligation to do ?

There was no express agreement upon the part of Warren to canvass for subscribers for any specified time ; and we have seen by the authorities cited that the court cannot fix a time for them ?

It was stated by the court below that the course taken by the plaintiff in error was a wrong upon the defendant in error. But if we look at all the facts, Warren took the course he had a legal right to take, and the course his interests demanded he should take. He offered to Stoddart to give him the benefit of all he had done, and to carry out the contract as far as they had executed it. But Stoddart, knowing how disastrous it would be to Warren not to get the remaining volumes, thought to *force* Warren to continue the canvass by a

refusal to perform his contract. He therefore told Warren he could not ride two horses, and if he accepted the agency of the original work, he would not furnish the remaining volumes. This so alarmed Warren that he waited until the 3d day of June before finally determining to accept the agency for the original book as to new business only, or as to future canvassing. He did only what his interests demanded of him, and only what he had a legal right to do, and just what Stoddart wrote him on the 30th of January, 1877, that he had the right to do. It would seem impossible, from the authorities, to hold that Warren expressly, or by implication, agreed to canvass the territory assigned to him for any definite length of time. There may have been the expectation that it would be for his interest, and to the interest of both parties, to continue to canvass this field during the time the work was being published ; but no such contract can be implied. It clearly appears from the letter of January 30, 1877 (*Printed Record, p. 27*), that the defendant in error himself understood that Warren might not continue to canvass for any particular time. In that letter he says : " Should you desire to work Britannica in accordance with " above terms, we will draw up a contract and forward to " you to sign. Except the assignment of territory, the " only thing in addition would be the terms on which we " would take your orders, *in case you should not go through* " *with the work*. As the orders would be your property, " we must ask you to say what you would take for them. " We think all these contingencies should be provided for " at the start."

Now it is clear that the defendant in error, Stoddart, understood that Warren might not go on with the contract, and he understood that our rights would be just what we claim them to be. And further, he led Warren to believe that he could *discontinue* and own his orders. There cannot be a great hardship then on Stoddart, as that was

his own understanding of our rights, and as he represented to us that such would be our rights, and Warren bought out Carroll on the faith of this letter.

Stoddart said this contingency should be provided for in the contract, but in drawing the contract it was not provided for. So that it appears that Stoddart himself understood that if the contract was terminated by Warren neglecting or refusing to go on to procure *new subscribers*, it was not to affect the orders already taken; they were, as the letter stated to Warren, to be his property. Stoddart says to Warren: "*Should you not go through* with the work,"—thus recognizing the right in Warren to decline to go through with the work, that is to continue the canvass, and expressly telling Warren that in such case the orders will be Warren's property.

To the fourth point above, we answer: that the agent, even if this was a pure agency, could not be required to turn over his contracts to the principal and trust to him to relieve the agent from his liability; and it is not perceived how a court of equity could have adjusted the matter in such a case. The law did secure to the agent (if Warren had been one,) the right of indemnity and protection, and Stoddart was bound by his express contract to deal with the agent as he had agreed to do—certainly as to all business which had been partially executed. There is no force in the position that the agent should have resorted to a court of equity. He even had the right, after Stoddart's default, to go and buy up his contracts and relieve himself from liability, in case Stoddart refused to *execute* the unexecuted part.

Saveland v. *Green*, 36 Wis. 612.

There is nothing in the bare relation of principal and agent to entitle either party to proceed in equity.

Burry v. *Severns*, 31 Beavan, 258.

O'Mahoney v. *Dickson*, 2 Schoales & Lefr. 400.

In general, a bill will not lie by an agent against his principal for an account, unless some special ground is laid, as the incapacity to get proof, unless by discovery.

Dinwiddie v. *Bailey*, 6 Ves. 136.

Vide, also,

Moses v. *Lewis*, 12 Price's Excheq. Rep. 502.

In this last case, the court refused to entertain jurisdiction for an account, it appearing that the whole matter was a set-off, or other defense at law.

See, also, *Fretas* v. *Don Santos*, 1 Younge & Jervis, 574, and *Smith* v. *Lereaux*, DeGex, J. & S., 1.

Our remedy at law was clear.

Vide 1 Story's Eq. Jur., § 462.

It is only upon the ground that Warren had agreed to canvass for some specified period of time, and that such performance was a condition precedent to Warren's right to order the books for the subscribers already obtained, and that Warren had failed to perform such condition precedent, that the instructions of Judge Blodgett can be sustained.

As the books were, by the terms of the contract, to be delivered as ordered by Warren before the termination of the contract to canvass was ended (even though there had been such an agreement), it is plain that an entire canvass could not have been a condition precedent, but that the agreement to deliver the books was an independent covenant.

This precise point was decided in the case of the *Philadelphia R. R. Co.* v. *Howard*, 13 Howard's (U. S.) Reports, 308.

In like manner, if the contract was one of pure agency, Warren having partially executed the authority, which in this case could not be severed, was entitled to have the books to fill the orders taken by him.

But one question then remains—the question of damages. The first question that arises under a continuous agreement like this, is, whether Warren can recover his entire damages on a single refusal, or breach (although there were in this case three refusals to perform the contract), one found on page 32, where Stoddart told Warren that he could not ride two horses, and if he accepted an agency for the original edition, he (Stoddart) would not supply him (Warren) with books to fill the orders already taken; and again on page 33, in the letter of June 6, 1878, in which said Stoddart, in reply to an order for books, said as to all future orders: "For the present they will be filled when cash accompanies orders." This letter was in reply to the telegrams contained on page 34 of the printed record. There is also a refusal in the telegram of June 11, 1878, page 34 of printed record, in which it is stated: "Will fill order when cash is received, in accordance with our letter of June 6." These several refusals, it is believed, were amply sufficient to justify said Warren in regarding this as a breach of the entire contract.

That one refusal was sufficient to entitle Warren to maintain this action, seems to be established by the case in 13 Howard's U. S., page 308; by the case of *Hockster* v. *DeLatour*, 20 English Law and Equity, 157; *Cort et al.* v. *Ambergate R. R. Co.*, 6 English Law and Equity; *Howard* v. *Daly*, 61 N. Y. Rep. 362; *3 Parsons on Contracts, 188–9.* See *2 Smith's Leading Cases, 53*, and cases there cited. See 19 Ill. 519. See cases cited in 83 Ill., page 49, *Lyon* v. *Culbertson;* 4 English Reports, Moak's Notes, page 406, *Roper* v. *Johnson.* By Stoddart refusing to deliver the books, except upon the terms of payment in cash, when, by the terms of the contract, he was entitled to a credit for the same, was equivalent to an absolute refusal, because Stoddart could not be justified in imposing new terms and conditions to his contract to

sell the books to Warren. He might just as well have required him to pay double the price as to have imposed any other new terms or conditions to the contract. Refusal by Stoddart except upon a condition Warren was not bound to accept, has the same effect as an absolute refusal, and the plaintiff was entitled to treat it as an entire repudiation by Stoddart of his agreement; *per* STEELE, J., in *Safford* v. *Kinsley*, 40 Vermont, pp. 516 and 513. To the same effect is the case of *Martin* v. *Eames*, 26 Vermont, pp. 476–481, *per* ISHAM, J.

The leading case in this country upon the subject of a breach of a continuous contract like this, is the case of *Masterton* v. *Brooklyn*, 7 Hill (N. Y.) 62. The doctrine of this case has been recognized and affirmed in this court. See

Philadelphia R. R. Co. v. *Howard*, 13 How. (U. S.) 308–344.

United States v. *Speed*, 8 Wallace's (U. S.) Reports, 85.

See, also,

Hockster v. *De Latour*, 20 English Law and Equity Reports, 157.

Chamber of Commerce v. *Solitt*, 43 Ill.

McPherson v. *Walker*, 40 Ill. 372.

Wolff v. *Willetts*, 35 Ill. 95–102.

Fox v. *Kilton*, 19 Ill. 533.

Roper v. *Johnson*, English Reports, 4 Moak's Notes, 397.

A refusal to perform by Stoddart was equivalent, for the purpose of sustaining an action for the breach of a contract, to an actual performance. The damages, however, in such case will be different. In the case of actual and complete performance, the damage is the contract price; in case of a refusal to perform, the damage is the

value of the work actually performed and the actual loss sustained by the plaintiff by not being permitted to perform the rest of the contract.

Phila. R. R. Co. v. *Howard*, 13 How. (U. S.) 308.
Clark v. *The Mayor*, 4 Comstock, 339.
Derby v. *Johnson*, 21 Vermont, 18–22.
Shannon v. *Comstock*, 21 Wendell, 457.
Clark v. *Marsiglia*, 1 Denio, 317.

The cases are collected on the subject in Smith's Leading Cases, page 53. In our case the measure of damages would seem to be the difference between the contract price and the subscription price, less the cost of delivering the books and collecting the pay for the same, to which should be added the depreciation upon the four volumes delivered, by reason of their being a broken set. The real measure of damages to which Warren is entitled, would seem to be the benefits or profits which he would have received from the actual performance of the contract by Stoddart. (*1 Sedgwick on Damages*, 7th edition, top-page, 177, marginal page 74.) He was entitled to the direct and immediate profits, or advantages, as the fruits of the contract entered into between the parties; and while, in many cases, profits as such are not recoverable, on account of their being too contingent or speculative in their nature, or too dependent upon the fluctuation in markets or chances of business to enter into a safe and reasonable estimate, yet if those profits or advantages are the direct and immediate fruits of the contract between the parties, they stand upon a different footing, that is, are part and parcel of the contract itself, enter into and constitute a portion of its very elements, something stipulated for, the right to the enjoyment of which is just as clear and plain as the fulfillment of any other stipulation.

(NELSON, J., in *Masterton* v. *Brooklyn*, 7 Hill, 62.) Where there is a market value to the article, the question is a simple one; where there is none, another question arises. As a general rule, those damages are recoverable where they can be said to have entered into the contemplation of the parties. In this case it is clear that both parties understood that this reprint was in the hands of Stoddart alone; no copies of it could be procured in the market. The proof upon this point was made (See *Printed Record, p. 35*): That these books could not be purchased in the markets; that this fact was known to both parties; and that Warren could not purchase any substitute therefor, except the Scribner edition, otherwise known as the Hall book; therefore the market price could not enter into or form an element of damages in this case. It was understood by both parties, contemplated and agreed, that Warren should procure subscribers for the entire work in his own name, and it was agreed that Stoddart would furnish to him the books to fill such contracts as he might obtain subscribers for; it was therefore contemplated that Warren should have a sub-contract with his subscribers for this book, and Warren is therefore entitled to the benefit of these sub-contracts, and they form a measure of damages in this case. Upon the subject of the loss of the sub-contract, see *1 Sedgwick on Damages* (*7th ed.*), *p. 137*. In the note upon that page, the author says: "The market rate, as "we have said, regulated the allowance of profits as a "general rule, and the profits which could have been "made out of the sub-contract are usually not recovera-"ble; but if it clearly appears that the plaintiff could not "have replaced himself in the market, the sub-contract "will, in certain cases, form a measure of damages. The "profits of such a sub-contract are sufficiently certain."

France v. *Gaudet*, L. R. 6 Q. B. 199.

Bories v. *Hutchinson*, 18 C. B. N. S. 445.

McHose v. *Fulmer*, 73 Penn. St. R. 365.
Van Arsdale v. *Rundel*, 82 Ill. 63.

Damages can be recovered for the loss of a sub-contract.

True v. *International Tel. Co.*, 60 Maine, 9.

And for the expense of performing a sub-contract.

Hind v. *Liddell*, L. R. 10 Q. B. 265.

They can be given in actions on contract where notice is previously given of the sub-contract.

Booth v. *Spuyten Duyvil Rolling Mills Co.*, 60 N. Y. 487.
Die Elbinger v. *Armstrong*, L. R. 9 Q. B. 473.
Ill. Cent. R. R. Co. v. *Cobb*, 64 Ill. 128–143.
Griffin v. *Coleman*, 114 E. C. L.
Sneed v. *Ford*, 102 E. C. L. 600.

If a notice that the party is to enter into sub-contracts, his part of the contract or agreement might be said to be made by taking a contract to supply articles to all the parties by sub-contract, and in such case loss of it is the natural consequence of a breach of such a contract. ALLEN, J., said in *Devlin* v. *Mayer*, 63 N. Y. 8, that the advantages of a sub-contract are too uncertain and contingent. The author says that we can hardly think this to be correct; if the plaintiff had taken ample security for the performance of the sub-contract, the value could be easily ascertained; in other cases it could be clearly ascertained, though with some difficulty. We shall see that in estimating the value of promissory notes in actions of trover the court estimated the value of the promises of individuals. The difficulty of ascertaining *the precise* amount of damages should not be a reason for refusing to give *any damages*. If uncertainty were an objection, the adavantages of a sub-contract could never be taken into consideration. Notice of the object of the contract

could not repair any such defect in a sub-contract, if it is not one which would, in the usual course of things, have been made; it will, of course, not furnish any measure of damages.

Snell v. *Cotttingham*, 72 Ill. 161.

Now it appears by record, printed record page 35, that evidence was given to show that the work could not be purchased in the market at any price, that the *Encyclopedia* was sold only by subscriptions, and that Warren could only take subscribers at a fixed rate, which Stoddart himself dictated by the contract, so that there could be only one measure of damages in this case, viz: the difference between the contract price and subscription price, less the cost of delivering the work, with such allowance as might be proper for casual loss or hazard in carrying out the contract with subscribers; to this it would seem that there should be added the loss on the volumes delivered. Warren was entitled, in this case, to the benefits of the sub-contract. The market rule, which in general regulates the price, cannot be applied in this case. It clearly appears that Warren could not have replaced himself in the market, and he is therefore without remedy, or else he must be entitled to the benefits of the sub-contracts which he had made with his subscribers, and which it was contemplated, both by Stoddart and himself, could be made. It is believed the profits of such a contract are sufficiently certain, and they were within the contemplation of the parties. Perhaps if the subscribers were all responsible, there is no case in which the damages could be more easily ascertained with certainty.

Now, there is only one other subject that it is believed the court should determine, in order that the court below may proceed without embarrassment. It is said, on page 39 of printed record, by Judge BLODGETT, that Warren had no right to purchase from his subscribers their out-

standing subscriptions and cancel his obligations to deliver them the Stoddart edition; that this was wrong toward Stoddart. It is believed that the authorities everywhere require the plaintiff to make the damages as light as possible. By purchasing these orders from his subscribers, Warren did, in fact, reduce the damages very largely. It is not perceived how Stoddart can complain of Warren for proceeding to cancel obligations of his subscribers against him to deliver the Stoddart edition, when Stoddart, by his own wrong, refused to enable Warren to fill the orders which he had taken for the Stoddart edition. This would be taking advantage of his own wrong.

It was held by this court, in *Wicker* v. *Hoppick*, 6 Wallace (U. S.) 99, that it was the duty of the party to use reasonable means to prevent or to reduce the damages.

In *1 Sedgwick on Damages, page 166, note a*, title, "Voidable Consequences," the cases are collected. The author says: "It is also plaintiff's duty to take reasonable steps to make the damages as small as possible. It is the vendee's duty to do the best he can for the vendor, and therefore to go into the market and purchase to fulfill his contract See *Miller* v. *Mariner's Church*, 7 Greenleaf, 51; *Luse* v. *Jones*, 39 N. J., where the furniture of a boarding-house keeper was wrongfully seized. It was stated that she could recover for loss in her business before she could re-furnish her house."

In *James* v. *Hobsden*, 47 Vermont, 127, it was held, that the plaintiff could recover what he paid to compromise certain notes which he had given defendant, although he could have defended them on the ground of failure of consideration. It was said he was not bound to follow them around to different courts and spend his time and fortune, and that the court would presume he did the best that he could.

In *Hinde* v. *Liddell*, L. R. 10 Q. B. 265, an action

for breach of contract to deliver shirtings, it appeared that the plaintiff had bought the best substitute he could get, after the defendant's breach, so as to perform a *sub*-contract he had entered into. Although this substitute was more expensive, and of better quality, it was held that he could recover the difference between the contract price and the price he paid for these shirtings. BLACKBURN, J., said: "There was no market price for this par-"ticular description of shirtings; in such a case, the meas-"ure of damages is the value of the thing at the time "of the breach, and *that must* be the price of the best "substitute *procurable*."

Warren had the right to procure a *substitute* to fill his contracts with. And the only substitute he could procure was the Hall edition. And Stoddart forced him to do this by refusing to give him the Stoddart edition, as he had agreed to do. If he has suffered damage, it was his own fault, and his own breach of contract that occasioned it.

It was said, in one case, that if the article could be purchased in the market, the market price furnished the rule; but even if it could not, the party who suffers from breach of contract must so act as to make his damages as small as he reasonably can; and therefore the plaintiffs must show that they could not have replaced the articles.

It ill becomes Stoddart to complain that Warren sought to reduce his damages, as he otherwise would necessarily have recovered a much larger sum.

It seems that Stoddart could have reduced the damages after a breach, by offering to fill the orders, so far as they had not been canceled, but this he failed wholly to do, persisting in the wrongful course he elected to pursue, as we say, for the purpose of discrediting Warren and breaking him up in his business.

VAN H. HIGGINS,
Of Counsel.

IN THE

Supreme Court of the United States,

(No. 274.)

OCTOBER TERM, A. D. 1881.

MOSES WARREN,
Plaintiff in Error,

vs.

JAMES M. STODDART,
Defendant in Error.

Error to the Circuit Court of the United States, Northern District of Illinois.

ARGUMENT FOR PLAINTIFF IN ERROR.

ISAAC N. ARNOLD,

Of Counsel.

CHICAGO:
HORACE O'DONOGHUE, LEGAL PRINTER, PARKER BUILDING, 95-97 WASHINGTON STREET.
1882.

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ARGUMENT FOR PLAINTIFF IN ERROR.

In 1878, A. & C. Black, of Edinburgh, Scotland, were bringing out a new edition of their great work, the *Encyclopedia Britannica*, of twenty-one volumes. I. M. Stoddart, of Philadelphia, undertook to reprint and sell the work in the United States. He entered into a contract with Moses Warren, of Chicago, to canvass a portion of the Northwest for subscribers for this reprint. He agreed to furnish Warren with the volumes of the work as they came out, on certain specified terms.

Warren entered upon the canvass, obtained several hundred subscribers, and delivered four volumes of the work. Then Scribner, Armstrong & Co., having purchased of A. & C. Black the exclusive right to sell the

original edition in the United States, entered the field and offered the original work, printed in Edinburgh, on the same terms as Stoddart was selling the reprint. Thereupon, Warren, finding the conditions under which he had undertaken the canvass radically changed, and a further canvass profitless, declined to canvass further. Stoddart then refused to furnish Warren with any of the remaining seventeen volumes of the work, and left him with his subscription list, on which four volumes had been, and seventeen more were to be delivered, on his hands.

In a suit by Stoddart to recover a balance on the account, Warren set up, as a set-off and in the nature of a cross-action, claims for damages by such refusal, and the important question in the case is: Was Warren entitled to such damages?

On the trial of this action Judge Blodgett held that Warren was not entitled to any damage, in any form. He held that Stoddart was under no obligation to fill the orders which Warren had already taken; that he, Stoddart, was not bound to carry out his contract with Warren to deliver to him the seventeen volumes necessary to complete the sets for which Warren had obtained subscriptions.

Judge Blodgett, so far as the plaintiff in error's claims were concerned, took the case from the jury, saying:

"I charge you that the defendant's claims for damages cannot be allowed." * * * And adds: "The "plaintiff is entitled to a verdict for the full amount claimed." (*Record, p. 41.*)

And the jury, in accordance with such instructions, rendered a verdict for $2,976.53.

The question raised in this court is, therefore, purely a question of law; and if, under the facts presented by the record, the defendant (Warren) was entitled to any damage or to any set-off, the judgment must be reversed.

There is no controversy about the facts, and the rejection of Warren's claims for damages is based on the assumption that Warren, by refusing to continue to canvass for the entire time during which the Encyclopædia was being published, in the language of Judge Blodgett, "*broke the contract.*" (*Record, p. 39.*)

The judge adds (p. 41): "I am clear that when the "defendant (Warren) saw fit to terminate the contract be- "fore it was completed, * * * he has no right to demand "that the plaintiff shall let him have the books on credit for "the purpose of filling the orders," to wit, the subscrip- tions already taken. (*Record, p. 41.*) And the judge adds: "In this view I therefore charge you that the "defendant's claim for damages cannot be allowed, and "that the plaintiff is entitled to a verdict for the full "amount."

The first question, then, to which I ask the attention of the court is:

I. When Warren declined to canvass any longer for Stoddart, did he "*break* the contract?"

Under the agreements of February and May, 1878, Warren entered upon the canvass of the territory specified, obtained a large number of subscribers, delivered four out of the twenty-one volumes, and was ready and willing, and offered to pay for the remaining seventeen volumes, according to the terms of the contract, but Stoddart refused to deliver to Warren any more of the twenty-one volumes, and left Warren with his subscribers on his hands, without the means of fulfilling his contracts with those subscribers. Warren refused to canvass for further subscriptions, because Messrs. A. & C. Black, of Edinburgh, had sold to Scribner, Armstrong & Co. the exclusive right to sell the original edition of the *Encyclopædia Brittanica* in the United States, and they offered this original genuine edition on the same terms that Stoddart offered the reprint. Under these circumstances,

Warren, seeing ruin, pecuniary and in reputation, if he went on, declined, as we insist he had a legal and moral right to do, such further unavailing canvass.

When Warren thus declined to canvass further, did he "*break the contract?*" We say, no.

There is no express obligation, nor any undertaking on the part of Warren, to canvass for any length of time; nor, under the circumstances, can any such obligation be implied. Such was not the expressed intention of the parties, and, by reference to their correspondence, we see very clearly that such was not their understanding of the contract.

In the letter of Stoddart to Warren, dated January 30, 1877, and which contains the basis of the contract, he says (*Record, p. 27*): "No books are to be returned to "us unless it is shown that they were not in good order "when shipped by us." After giving the details of the proposed agreement, Stoddart adds (p. 28):

"Should you desire to work *Brittanica* in accord-"ance with above terms, we will draw up a contract and "forward for you to sign. Except in the assignment of "territory, the only thing in addition to the above would "be *the terms on which we would take your orders, in case "you should not go through with the work.* As the or-"ders would be your property, we must ask you to say "what you would take for them. We think all these con-"tingencies should be provided for."

We ask this court to note that, in this letter, which is the basis and contains the details of the contract, Stoddart recognizes Warren's right to stop canvassing, at his pleasure, for he says: "In case you should not go "through with the work, on what terms would you let us "have your orders? The orders would be your property "should you elect not to go through with the work; what "will you let us have them for?"

With this clear and definite understanding of Warren's right to elect not to go through with the work, Stoddart says, in a letter dated February 6, after referring to his letter of January 30: "We will draw up a contract and send it for your acceptance and signature." (*Record, p. 28.*)

A contract based on the two letters above referred to, was drawn up by Stoddart, sent to Warren and executed. This contract contains no agreement on the part of Warren to canvass for any length of time, or until the happening of any event. The contract gives to Warren the exclusive right to canvass certain specified territory "during the time that Warren shall faithfully perform his part of the agreement."

The court is asked to interpolate into this agreement a covenant on the part of Warren, that he would continue to canvass during the entire seven years expected to be required to complete the work, and this in the face of the letters showing that the both parties contemplated that Warren might not go through with the work, and on what terms, in case such an event should occur, Stoddart might buy of Warren the subscription! This would be not only making a new contract for the parties, but interpolating a provision directly contrary to their own understanding. It is clear Warren agrees to canvass faithfully, while he canvassed, but he did *not* agree to continue the canvass until the whole twenty-one volumes were published; he did *not* agree "to go *through* with the work."

In this connection, and as illustrating the understanding of the parties, that there was no obligation on the part of Warren to canvass for any definite period, or until the happening of some event, we desire to call the attention of the court to the facts relating to the Carroll contract. In the same letter of Stoddart to Warren, dated January 30, 1877 (*Record, p. 27*), in which Stoddart suggests that Warren might "*not go through with the work*," he says:

"John Carroll, of your city, is the party who has "taken orders there for the *Brittanica*. By agreement "with him last August, in case he should give up the "business, his orders were to come into our possession;" and Stoddart then states the terms on which he was to take from Carroll these orders or subscriptions.

Let it be observed, in this connection, that in this very letter recognizing Carroll's right "*to give up the business*" (*Record, p. 27*) ("in case he should give up the business," is the language used), Stoddart goes on to say: "*In case* YOU *should not go through with the work*, it "would be necessary to introduce into the contract the "terms on which we would take your orders, *in case you* "*should not* go through with the work." As the orders would be your property, we must ask you to say what you would take for them. "We think all these contingencies should be provided for."

Stoddart, after thus clearly recognizing Warren's and Carroll's right "*not to go through with the work*," "to give up the work and to give up the business," draws up and sends to Warren the agreement, in which there is no promise on the part of Warren "*to go through with the work*," and now the court is asked to supply this omission, and, in effect, to make a new agreement for the parties, containing a provision which the parties not only did not make, but in direct conflict with their understanding, as shown by the written correspondence.

II. Warren bought and paid for Carroll's subscription list, and so far as that list was concerned, even if he had failed to comply with the agreement as to the subscribers which he obtained, such failure would furnish no excuse for Stoddart's refusal to furnish the books to fill the orders of Carroll.

In Stoddart's letter to Warren, of February 6, 1877, he says (*Record, p. 28*):

"You can have Mr. Carroll's orders by paying in the $1,000, and settling with him."

Warren paid the $1,000, bought Carroll's subscription lists, took an assignment of his contract, which provided for the contingency of his giving up the business. See letter of Stoddart to Warren, dated January 30, 1877, containing the words, "*In case he should give up the business*," etc. (*Record, p. 27.*)

Under this arrangement with Warren and Stoddart, in reference to Carroll's subscription list, all that remained to be done, was for Warren to receive, pay for, on the terms specified, and deliver the remaining volumes. But Stoddart refused to deliver them, and it seems to us perfectly clear that as to all damages resulting from such refusal, Stoddart was liable, and the court should have have so directed the jury.

The defendant in error insists that Warren was bound by the agreement to go on with the canvass during the time required for the publication of the entire work of twenty-one volumes, and that by reason of his failure to do so he forfeited all his rights under the contract, and must submit, without remedy, to ruin.

In reply we insist, and have attempted to show, that there was no obligation, express or implied, on the part of Warren, that he should continue to canvass during the entire period of publication, nor for any definite period. He was to canvass in a specified territory, and canvass faithfully while he did canvass, but assumed no obligation as to time; and when he ceased to canvass, then Stoddart could place other canvassers in this field. To imply an obligation on the part of Warren to canvass seven years, would be, as already stated, to create a new contract. The contract, as made by the parties, and as both understood it when it was executed, was, that Warren was to canvass in the territory named, for subscriptions to *the work*, not a part of it, not broken and incomplete sets of

it; and when such subscribers were thus obtained by Warren, the contract *pro tanto* was executed, and the obligation on the part of Stoddart was fixed, to furnish "*the work*," all the volumes thereof, on the terms specified, to enable Warren to deliver the entire series to such subscribers, and Stoddart, having refused, is liable for all the damages which Warren sustained by such refusal.

Stoddart, knowing that Warren occupied, by his well-organized corps of canvassers, the great field of the Northwest, and was incurring very large expenses, refused, in violation of the contract and of good faith, to furnish the books necessary to enable Warren to supply his subscribers, and sought to compel Warren to go on and canvass for a reprint, when the original genuine edition was in the field at the same price. To have gone on would have been ruin. We insist, not only that Warren was under no legal obligation to continue the canvass, but, on the grounds of fair-dealing, he was justifiable in declining a further canvass. With the Edinburgh edition in the field on the same terms as the reprint, the conditions under which Warren undertook the canvass had radically changed, and there was no legal or moral obligation on his part to go on with an up-hill, unprofitable, unavailing task of canvassing for an inferior article. Can it be fairly contended that an agreement to canvass for a book or a patent right, with no stipulation as to time, may not be properly terminated by the canvasser, when the introduction of a better or more popular book, or a later edition, or an improved patent, renders the continuance of the canvass fruitless of success? Again, by the agreement of May 1, 1877, it was recited that differences had arisen between the parties (*Record, p. 20*). "As relates to the furnishing of "stock by said J. M. Stoddart, it is declared by us that "the true intent and meaning of said agreement, as re-"lates to the furnishing of stock by said J. M. Stoddart "& Co., and *the sale of said work to subscribers by said*

"*Moses Warren*, are to the effect that J. M. Stoddart & "Co. *shall furnish all stock complete*, in the forms in "which it is delivered to subscribers, including cloth and "uncut styles," etc.

This explanatory agreement has reference not only to the style in which the work was to be delivered, but also clearly recognizes Warren's right to sell the work as vendor, and the obligation of Stoddart to furnish to Warren "*all stock complete.*" Stoddart agrees to furnish "*all* stock *complete*;" that is, the entire work. Can Stoddart stop in the midst of the execution of this work, and leave Warren with hundreds of subscribers, who have received four only out of the twenty-one volumes? These imperfect, broken sets would be valueless. Surely this court will never hold that Stoddart could thus violate his agreement to deliver the work complete, and not be liable for the damages!

When Warren obtained the subscribers and offered to pay for the work, according to the terms of the contract, he had a right to have the agreement fulfilled by Stoddart by the delivering of all the remaining volumes, to supply the subscribers already obtained.

I have thus far discussed the question whether Warren was bound to continue the canvass until the last volume was published. If he was not bound to do so, then the claim for damages is established. Stoddart's only excuse for a refusal to deliver the remaining volumes is, that Warren's canvass to the end of the publication was a condition precedent to the delivery. If he fails to establish this, then the claim of Warren for damages is fixed.

III. But to say that the canvass by Warren to the end of the publication of the entire work was a condition precedent to Warren's right to have the volumes delivered as published, is absurd. His right to each volume as it was published was fixed and vested as soon as he

obtained a subscriber. This being done, as soon as a volume was issued, having already obtained a subscriber, his right to the volume became absolute, vested, and a right of action against Stoddart, for a refusal to deliver the volume, was perfect.

IV. Conceding that Warren was bound to continue the canvass until the publication was completed, and that he wrongfully stopped canvassing, this would not excuse Stoddart from delivering the volumes necessary to supply subscribers already obtained. The rights of third parties, the subscribers, had intervened.

If the relation between Stoddart and Warren be considered as that of vendor and vendee, the contract was executed, or so far executed that Stoddart could not rescind it. He could not put Warren in the condition of *statu quo*. See

Story on Contracts, 1092–1093.
Hill v. *Renne*, 11 Metcalf R. 271–2.

V. If the relation between Stoddart and Warren be considered as that of agency, as has been contended, the same principle applies.

If Warren was the agent of Stoddart for the sale of the Encyclopædia, this agency, so far as relates to obtaining subscribers, was executed, or in part executed. He had, by authority of Stoddart, obtained subscribers and made a contract with such subscribers, for the delivery to them of the entire work, and actually delivered, in part performance of such contract, four out of twenty-one volumes. Stoddart had authorized Warren to do this. After the agency is so far executed that the rights of third parties become fixed, the principal cannot revoke the agent's authority, nor rescind the partly-executed contract which he had authorized his agent to make. He could take

away Warren's authority to obtain new subscribers, but not to complete the contracts already partly executed. Having agreed to deliver to Warren the twenty-one volumes as published, and authorized Warren to sell them to subscribers, and after Warren had made a contract with each subscriber to deliver the entire work, and had actually delivered four volumes, Stoddart could not legally refuse to deliver the remaining seventeen volumes. The contract or agency was executed, the rights of third parties had intervened, Stoddart could not place the parties *in statu quo*.

See Story on Agency, § 466, p. 628.

Treating of the right of the principal to revoke the agent's authority, the learned author says :

" As to the part unexecuted, either as to the agent " or third persons, the revocation would be good as to " the part unexecuted, *but not as to the part executed or* " *partly executed.*"

In this case, the authority to obtain the subscribers and to contract for the delivery of the whole work was executed.

The author says further :

" The principal might revoke, if the authority *be severable.*"

It will, I think, scarcely be insisted that an authority to obtain subscriptions as in this case to an entire work, and when the agent has obtained the subscribers, and delivered part of the work, and contracted to deliver the whole, the principal can revoke the authority after a partial delivery. An authority to obtain subscribers for an entire work, and contract for the delivery thereof after the subscribers have been obtained and part of the volumes delivered, clearly is not severable.

Surely in this case, the authority being for an entire work, he cannot revoke it when half or partly executed.

The following quotation seems to be decisive on this point :

" But if the authority be not (thus) severable, and " damage will thereby happen to the agent, on account of " the execution of the authority *pro tanto*, then the prin- " cipal will not be allowed to revoke the unexecuted part, " or at least without fully indemnifying the agent."

Story's Agency, sec. 466.

Certainly very serious damage did happen to the agent (Warren) by Stoddart's refusal to deliver the twenty-one volumes, which he had authorized Warren to contract to sell, and part of which had been delivered.

We insist, in the language of Story, that Stoddard must fully indemnify Warren, the very question which Judge Blodgett refused to allow the jury to consider.

It is laid down in *Chitty on Contracts*, p. 1092 :

" Nor can a contract in general be rescinded *in toto* " by one of the parties, when both of them cannot be " placed in the identical situation which they occupied " before the contract was made."

" Accordingly, when one party has derived some " advantage from the other party having to some extent " performed the contract, the general rule is that the " agreement shall stand, and that the defendant must " perform his part thereof, and seek compensation in " damages for the plaintiff's default."

Chitty on Contracts, pp. 1092–1093, and cases cited.

Again, it is laid down in *Russell on Factors*, and quoted and sanctioned in *Dunlap's Agency*, page 185, note 1 :

" It may be stated, as a general rule, that unless the " authority given to the factor be severable, so as to ad-

" mit of the revocation of the unexecuted part, without " exposing him (the factor or agent) to damage by reason " of his having executed it *pro tanto*, the principal will " not be allowed to revoke that authority after *such part* " *execution*, at least without fully indemnifying the factor " against the consequences."

It seems to us that the ruling of Judge Blodgett, when he decided that Stoddart might revoke Warren's authority, and deprive him of the means of fulfilling the contract for the sale and delivery of the whole work—a contract which Stoddart had authorized Warren to make, and which was partially executed—and in ruling that Stoddart might not only revoke Warren's authority, but rescind the contract to deliver the remaining seventeen volumes, and all without any indemnity whatever, was in direct conflict with the principles above laid down, as well as the plain dictates of justice.

See Dunlap's Paley's Agency, p. 185 and note 3.
1 Peters' Rep., p. 1.
8 Wheaton's Rep., p. 174.

Let us, then, state the rights of the parties as we understand them.

1. We say that this was an agreement on the part of Warren, for a faithful canvass in the territory named, for obtaining subscriptions to the *Encyclopædia Brittanica*, for the work as a whole, and not for some volumes thereof; and, on the part of Stoddart, to deliver to Warren all the volumes comprising the work, as fast as published, so that Warren could fill the subscriptions which Stoddart had authorized him to obtain, and that Stoddart, having refused so to do, is liable for all damage sustained by such refusal.

2. Warren's agreement was for a faithful canvass, as long as such canvass continued, but he assumed no obligation, express or implied, to continue the canvass

for any definite period, nor until the publication or reprint was complete.

If we are right in these positions, Warren's claim for damages is perfectly clear, and, of course, the judgment must be reversed.

3. Even if Warren "broke the contract" by declining to canvass further, this would not relieve Stoddart from the obligation to deliver all the volumes needed to fill the subscriptions obtained.

Immediately each volume was published, Warren was entitled to receive it on the terms of the agreement, and he could have maintained an action against Stoddart for refusing to deliver it. The continuance of the canvass by Warren was not a condition precedent to such delivery, but the right of action by Warren against Stoddart was perfect as soon as he refused to deliver any volume. It is perfectly well settled that a party hiring for five years at $1,000 per annum, payable at the end of each year, may sue for and recover for the time he actually serves, and if he abandons the service before the expiration of five years, and the employer is injured by such abandonment, he may recoup his damages against the claim for the service actually rendered. If the party had served three years, he would recover $3000, less the damages sustained by his not serving the other two years.

So in this case, if we concede that Warren "broke the contract" by refusing to canvass further, his right of action was perfect when, and as often as, Stoddart published and refused to deliver an additional volume to those already delivered; and against such actions by Warren, all that Stoddart had a right to claim was to *recoup* the damage, if any, resulting from such refusal to canvass, against the damages sustained by Warren, by Stoddart's refusing to furnish the volumes as they came out, to fill Warren's subscription list. These questions should have been submitted by the court to the jury.

See the cases collected on this point in—

2 Chitty on Contracts, pp. 844, 845, and notes.
Britton v. *Turner*, 6 New Hampshire, 481.
See Laton v. *King*, 19 N. H. 280.
White v. *Atkins*, 8 Cushing, 367.

"When, by the performance of the service for the "quarterly, monthly or other period, any one of the peri- "odical payments becomes due, the right to receive it *be- "comes vested, and the right is not lost or divested by any "subsequent desertion or abandonment of the contract by "the servant.*"

2 Chitty on Contracts, p. 848, and cases cited.

So here, when Warren had obtained the subscribers and contracted to deliver the whole work, and had executed such delivery in part, his right to receive the entire work beeame vested, and could not be divested by his omission to continue the canvass.

DAMAGES.

If we are right in either of the positions we have taken, then it follows that Judge Blodgett erred in taking the case from the jury and in deciding that Warren was not entitled to any damage in any form. He said to the jury: "I charge you that the defendant's claim for "damages cannot be allowed, and that the plaintiff is "entitled to a verdict for the full amount." (*Record, p. 41.*)

This declaration renders the discussion of the measure of damages and the rules by which they shall be estimated unnecessary to the determination of the case. If Warren was entitled to any damage, the judgment below must be reversed.

Yet, as the case must be tried again, it would seem proper for the court to indicate the rule of damages which ought to govern the case, when it shall be again tried.

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